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No. 12527

United States
Court of Appeals
For the Ninth Circuit.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION, a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 553 to 1097)

Appeal from the District Court for the Territory of Alaska Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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GEORGE B. SCHMIDT

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Would you state your name, please?

A. George B. Schmidt.

Q. Where is your residence, Mr. Schmidt?

A. Juneau, Alaska.

Q. Mr. Schmidt, did you work for the Juneau Spruce Corporation [492] in Juneau?

A. I did.

Q. Between what dates were you working for the Company?

A. From May 6, 1947, to January 19, 1948.

Q. Where have you been employed before that, Mr. Schmidt?

A. With the Juneau Lumber Mills.

Q. Where have you been employed since then?

A. Columbia Lumber Company.

Q. What is your present position with the Columbia Lumber Company?

A. Assistant to the President.

Q. During the time you were with the Juneau Spruce Corporation, what was your position?

A. Assistant Manager.

Q. During the time you were with the Juneau Lumber Mills incorporation what was your position?

A. Vice-President and Assistant Manager.

(Testimony of George B. Schmidt.)

Q. What was the nature of the work you did for the Juneau Lumber Mills?

A. Well, I handled their sales and had full charge when the owner and President of the concern wasn't there—Mr. Rutherford.

Q. How many years have you been employed in the lumber industry?

A. In Alaska, twelve years, and practically all my life before [493] that—all my working life.

Q. Mr. Schmidt, are you familiar with the types of logs that are produced in Southeastern Alaska?

A. Yes.

Q. Have you observed the quality and kind of logs delivered to the Juneau Lumber Mills and Juneau Spruce and Columbia Lumber Company from Southeastern Alaska?

A. Yes.

Q. How long did you work for the Juneau Lumber Mills where you would be able to observe this log supply?

A. All the time I worked for them.

Q. How long was that?

A. From 1937 to when they sold, about eleven years—ten years.

Q. Mr. Schmidt, during that period of time, from how many different sources would you say, have you seen logs bought and sawed?

A. From all over Southeastern Alaska, the Juneau area and Ketchikan area and West Coast area.

Q. Would you be familiar with the particular

(Testimony of George B. Schmidt.)

kinds of timber that can be produced from this particular area?

A. Different kinds of timber.

Q. What kinds?

A. Spruce, hemlock and cedar. Cedar is very small and normally spruce—the mills attempt to get at least sixty [494] five per cent, and probably thirty-five per cent hemlock, and the balance of cedar, which is very normal.

Q. Will you explain the logging practice in Southeastern Alaska as to logging particular kinds and leaving other kinds, or just how you do it?

A. You have no choice in the matter. When you take an area you have to cut it clean. That is the Forest Service requirements. When you choose an area and buy at a sale you attempt to get an area with spruce in it, because spruce is the most salable type of lumber that you can get.

Q. But you do have to take whatever comes?

A. That is right.

Q. Is all the commercial timber in Southeastern Alaska under the Forest Service?

A. Yes; that is right. There are a few exceptions, but so rare that you can't really call them a source.

Q. The other source is from what?

A. Privately owned timber that they may have taken homestead rights on, but by and large forest timber is controlled by the Forest Service in Southeastern Alaska.

(Testimony of George B. Schmidt.)

Q. Mr. Schmidt, are you familiar with the quality and grades and different kinds of lumber that would be produced from lots of timber which the Forest Service sells?

A. I can speak from the experience I have had; yes. [495]

Q. Have you had any experience with the timber at Edna Bay?

A. Yes, when I was working with the Juneau Lumber Mills we had a sale there, I think it was in 1937 or 1938. We produced about three and a half million feet of timber in that area, which is largely spruce. Out of it our requests were about twenty-five per cent clears and the balance was common. At that time we didn't produce shop lumber. There wasn't a great deal of a market for shop at that time, but there was a big demand for clears. That is one of the reasons we took that timber in that area. The timber was very choice and would produce a great deal of clears.

Q. Would you explain again clears, shop and common, again?

A. Clear lumber is one without a great many defects. It runs into B and better, and C and D. B and better allows a very few defects in the way of knots or pitch pockets or things of that sort. C and D progressively allow more defects. Your shop has defects in it which would not be permitted in a grade of common, No. 1 common, but in the shop you can have large knots in the thing but get

(Testimony of George B. Schmidt.)

clear cuttings out of your piece of lumber and produce cuttings for doors and windows and things of that sort. Common is divided into three classes, 2 and better common, and No. 3 common, and a No. 4. Up here a No. 4 isn't of much value. In order to get it on the market it costs more [496] than it is worth. No. 3 has defects so that probably a piece can hold together and still be sold as a No. 3. No. 2 has plenty of knots in it, but it is workable and usable as construction lumber and select lumber is higher. It runs between clear and common.

Q. The common is the lower priced? Is there much spread between the best common and the poorest clear?

A. It depends on the market and the time of production.

Q. Is there a market now for shop lumber?

A. Yes, there is a market for shop lumber.

Q. Does that bring a better price than the common?

A. Yes, a considerably better price.

(Whereupon the jury was duly admonished and Court adjourned until two o'clock p.m., May 4, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Andersen: At this time, your Honor, I desire to make the same motion on behalf of the witness Flint on behalf of the International as I did

(Testimony of George B. Schmidt.)

with the other witnesses, and I presume the Court will take the motion under advisement?

The Court: Yes.

Mr. Banfield: May it please the Court, in this case we intend to show what the operations of the Juneau Spruce Corporation would have been in 1948 during the period from [497] April 1, 1948, to May 31, 1949; March 31, 1949, had there not been a picket line at the mill or any inducement to the employees not to work, and in doing so we have prepared a prospective profit and loss statement which will have to be proved by other witnesses. The purpose of this witness and of the exhibit, which I will state the offer, is to show the grades of lumber which would be from logs garnered, as Mr. Hawkins testified, for the year 1948, to show in an easy way what kind and to what extent each grade of lumber would be produced. That, of course, would later be followed up by testimony of grades and quantities in the grades that would be realized on the market, so the testimony of the witness at this time, standing by itself, would not appear to have any purpose in the case, but I wanted to connect it up to what the purpose is to show and apprise the Court and counsel.

The Court: Very well.

Mr. Banfield: I would like to have this marked for identification, two sheets of paper which we are offering as one document, which are marked Page 17 and Page 18 and which bear the heading "Ju-

(Testimony of George B. Schmidt.)

neau Spruce Corporation, Juneau, Alaska, Production by Grades, Months, etc.''

The Court: You don't have to identify it if it is for identification. It may be marked for identification.

Mr. Andersen: As one exhibit?

Mr. Banfield: As one exhibit. [498]

Clerk of Court: It will be marked Plaintiff's Exhibit No. 10 for identification.

Mr. Andersen: Are you going to interrogate this witness regarding this?

Mr. Banfield: Yes, I am.

Mr. Andersen: Don't you have an extra copy of it?

Mr. Banfield: I have one for myself and associate attorney. I am sorry I don't have another one; however, we have no objection to your coming over here at the time.

(Whereupon the witness George B. Schmidt resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows:)

Q. Mr. Schmidt, have you examined the document marked Plaintiff's Exhibit 10 for identification previously? A. Yes, I have.

Q. Have you studied it?

A. Yes, I have.

Q. Have you studied each of the items on this exhibit with particular reference to the column marked ''Percent''? A. Yes.

(Testimony of George B. Schmidt.)

Q. Now, that column shows certain percentages of the various types of lumber and I would like to know at this time if those percentages reflect accurately the percentage in each grade which the lumber produced in Southeastern Alaska would run after it was graded? [499]

A. It would depend—it would reflect what they produced, and as I understand, they got on a basis of practically 50% from——

Q. I mean from all Southeastern Alaska, all the logging camps? A. That is correct.

Q. Have you examined these percentages with a view of determining whether they are higher or lower than the average run of logs in Southeastern Alaska?

A. Well, if you take and exclude the West Coast, you would probably.

Q. What do you mean by the West Coast?

A. The West Coast of Southeastern Alaska, Kosciusko Island and that area in there. I would say this is a very conservative estimate, because my experience with timber in that area, there is twenty-five per cent clears and from other areas from ten to fifteen per cent, depending on the exact—the different locations they were taken from, and I would think if this represents quite a percentage from the Kosciusko area, then their percentage is too low. I would think that it would run about twenty per cent, if you were cutting general run logs from Southeastern Alaska including the logs from Kosciusko area.

(Testimony of George B. Schmidt.)

Q. If you were just cutting logs with only a small proportion from that area, that is general run? [500] A. This would be it.

Q. Would you say that there is any question but what these grades, of clears, for instance, the total——

Mr. Andersen: May it please the Court, may I again object to these leading questions.

Mr. Banfield: I was just going to show what it shows on the exhibit, your Honor.

Mr. Andersen: The exhibit speaks for itself.

The Court: Well, let's hear the question.

Q. Mr. Schmidt, it shows on the exhibit here that——

Mr. Andersen: Pardon me, that is not in evidence. The document is not in evidence. It has only been offered for identification. It is not an exhibit.

The Court: Well, I don't quite get your objection now.

Mr. Andersen: Well, he refers to it as an "exhibit." It is not an exhibit in the case.

Mr. Banfield: It is an exhibit for identification.

Mr. Andersen: Only.

Mr. Banfield: Sure.

The Court: I think that is understood.

Mr. Andersen: That is true, your Honor.

Q. Now, Mr. Schmidt, this computation is based upon 15.54 per cent of the logs deemed clear logs?

A. That is, clear spruce. [501]

Q. Clear spruce logs? A. Yes.

(Testimony of George B. Schmidt.)

Q. If you were cutting a particular run of logs in Southeastern Alaska from several, numerous sources, would the percentage of clears be higher or lower than that figure?

A. Well, if you take the general run of logs it would be less than this figure, I think, if you just take the ordinary run, but if you take the West Coast it would be considerably higher than this.

Q. If you took fifty per cent of the logs from what is called the Edna Bay area, and particularly, all from Kosciusko Island, under the Forest Service practices, and took fifty per cent of your logs from the general logging areas in Southeastern Alaska, what percentage of clears would you then get?

A. You are talking about clear spruce now?

Q. Clear spruce.

A. I should say it would be twenty per cent.

Q. Now, of the clear hemlock—how would that run from just a general run of logs without any from the Kosciusko Island area?

A. I think you have got it about right here, pretty close to five per cent, and I don't think there would be much difference. It might be a trifle more if you include Kosciusko. [502]

Q. If you have fifty per cent of the logs come from general loggers and fifty per cent from the Edna Bay, what would the per cent of clear hemlock then be?

A. It would probably run about six per cent.

(Testimony of George B. Schmidt.)

Q. Six per cent? A. Yes.

Q. Now, Mr. Schmidt, with respect to shop lumber, the exhibit here shows 11.37 per cent as being shop lumber. What do you think would be the percentage from the general run of logs in Southeastern Alaska in the shop grade?

A. Well, I think this also is low. I believe it should be pretty close to twelve per cent. I think twelve or thirteen per cent; I think around in there.

Q. How would it be in the shop grade if you took fifty per cent from the general area and fifty per cent from the Kosciusko Island area?

A. I think a recovery there would be about fifteen per cent.

Q. Instead of 11.37 as shown here?

A. That is right.

Q. Now, in the cheaper grade of lumber, that is the common spruce and hemlock—is that generally sold at the same price, Mr. Schmidt? Common spruce and hemlock?

A. Yes, there is no difference.

Q. How would the common run from just general logging areas as compared to how it runs as shown on this sheet? [503]

A. Well, I think that, so long as you have got the others in this sheet under what I estimate, therefore your common would be showing too much common.

Q. In other words, this exhibit for identification shows too high a per cent of common?

(Testimony of George B. Schmidt.)

A. Too high a per cent; yes.

Q. This exhibit shows 67.48. About what do you think it would run?

A. It will run about, probably about fifty-six per cent, something like that.

Q. Now these for Nos. 1, 2, 3 common?

A. They include select.

Q. Select merchandise, those three classes generally are called select?

Mr. Andersen: Could I interrupt just a moment, your Honor, to inquire whether this witness compiled this information?

A. You mean this that is on here?

Mr. Andersen: Yes.

A. No, sir.

Mr. Andersen: Then, may it please the Court, I think I shall object to the proposed document for identification. I presume it is to go into evidence. The document was compiled by somebody else other than the witness. They can't call a witness to correct their own document, or [504] explain their own statement on a different basis than it would probably be offered. I think it is incompetent, irrelevant and immaterial.

Mr. Banfield: If the Court please, this document, of course is just one of the very numerous items which have to be proved in a damage case of this kind. This document was not prepared by this witness, but by a person who will follow. It takes various experts to testify on various matters. This

(Testimony of George B. Schmidt.)

witness is an expert on this particular subject. This person who prepared it will be produced at a later time, and I will state that we are relying on it even though it is a conservative estimate.

Mr. Andersen: The person who compiled it should be called, otherwise four or five people will be testifying to the same exhibit. It is incompetent, irrelevant and immaterial, may it please the Court, for this witness to testify to it.

Mr. Banfield: It is only out of order, that is all.

The Court: It is within the discretion of the Court for a witness to testify out of order, but there should be some reason. If there isn't, first there should be the witness who made or compiled the record.

Mr. Banfield: It is only for the convenience of the Court. If we put that witness on to testify in regard to this, how he prepared this, and then there would have to [505] be a witness put on to prove the authenticity of the figures.

The Court: You mean this is done for the accommodation of this witness?

Mr. Banfield: It will save bringing him back twice and another witness twice, and there are other exhibits. He would have to be on the witness stand twice and it would delay the trial interminably.

The Court: If it will expedite the trial, that is a sufficient reason. Objection overruled.

Mr. Andersen: As I understand it, every witness is going to testify twice about the same docu-

(Testimony of George B. Schmidt.)

ment? I can't see the sense in that. It is cumulative and repetitious, a waste of time and a delay of the trial, rather than an expedition of the trial.

Mr. Banfield: I am afraid, Mr. Andersen, you didn't understand. It will save them appearing twice and they will only have to appear once.

Mr. Andersen: I understood both—two witnesses were going over one document. That is what I say is cumulative and repetitious.

The Court: Until we reach that stage we can hardly pass on whether it is cumulative.

Mr. Andersen: That is what counsel stated, your Honor.

The Court: There is no particular chance that this [506] testimony is going to be undisputed?

Mr. Andersen: It may well be.

The Court: Then the Court wouldn't permit any cumulative testimony. You may proceed.

Mr. Banfield: Whatever the previous question was, I will withdraw it.

Q. Now, Mr. Schmidt, with regard to the second page of this exhibit for identification, page 18 of the exhibit. Under "Cedar" there is a showing there that cedar would run .6 per cent or six tenths of one per cent of the logs from this entire area. Do you consider that a correct statement?

A. I think that is excessive.

Q. What do you think it would run?

A. It is so small I don't think it would run more than .2 of one per cent.

(Testimony of George B. Schmidt.)

Q. Is cedar more expensive than common or less expensive?

A. It depends on what the recovery is. If it is clears it runs up, but most of the cedar in this area is common.

Q. Shop grade?

A. Perhaps the same as the other, the hemlock and the spruce.

Q. Now, Mr. Schmidt, have you examined with particular attention the distribution of grades within the classifications of lumber? For instance, this exhibit for identification shows various types and sizes of vertical grain clear spruce, B and better, and of the clear spruce it [507] states that the B and better vertical grain 5 by 4 by 6 and wider would be 1.56 per cent, and going on for the different sizes and different grades and different types, it gives the percentage of clear spruce which would come out in each type. Have you examined that?

A. I have examined that, but that is largely a matter of manufacturing. I could only speak for the total of clears and the total of shop and common.

Q. You don't know how it would run out?

A. I couldn't break it down in those sections.

Q. When you were producing lumber, how was it determined what actual sizes you will cut out?

A. There is two or three different factors in that. One, are your orders, and then usually you

(Testimony of George B. Schmidt.)

try to cut what brings the best price on the market and what is marketable. That is determined by the market at the time of the cutting. There is no set rule for what you are going to cut today and what you might cut next month.

Q. Now, Mr. Schmidt, this exhibit for identification shows that there would presumably be a total production of 4,680,000 feet of lumber a month; in other words, forty-six million a year that would be, wouldn't it? A. Yes.

Q. You were at the Juneau Spruce plant until what date? A. June 19, 1948. [508]

Q. Were you acquainted with the condition of the plant at the time you left there? A. Yes.

Q. Would the plant, in that condition, have been capable, working on a two-shift basis, of producing in the year 1948 forty-seven million feet of lumber?

A. Yes; it probably would exceed that. We were cutting around 100,000 feet to a shift at the time. That would be 200,000 feet a day, twenty-five days, two and a half million a month.

Q. Two and a half?

A. Wait a minute. One hundred thousand—that is two hundred thousand a day—and a twenty-five day month.

Q. What did you say would be the average daily production?

A. Pretty close to two hundred thousand feet.

Q. Would that be with making allowances for

(Testimony of George B. Schmidt.)

temporary shutdowns, accidents and things like that?

A. Yes; sometimes you exceeded that and some days under that, but the average was one hundred thousand feet to a shift.

Q. Mr. Schmidt, what was the average production of this mill when Mr. Rutherford had it?

A. About the same, but he only ran one shift.

Q. During the time you worked for the Juneau Spruce Corporation, was there ever any certification by the [509] National Labor Relations Board designating any appropriate bargaining unit at the mill?

A. I didn't understand your question.

Q. While you were employed by the Juneau Spruce Corporation, was there any certification by the National Labor Relations Board determining any appropriate bargaining unit at the mill?

A. No.

Q. Was any labor organization or other representative ever designated by the National Labor Relations Board as the bargaining agent for any employees? A. No.

Q. Mr. Schmidt, were there any longshoremen who were members of Local 16 employed by the Juneau Spruce Corporation during the period that you worked for that Company?

A. That is the local organization?

Q. Yes. Tell me, while you were working for the Juneau Spruce Corporation, what particular job did they do?

(Testimony of George B. Schmidt.)

A. They loaded—when they were employed by the Juneau Spruce Corporation, they loaded some scows for customers and loaded some boats for customers, usually at their request, and it was the understanding at the time that the work——

Mr. Andersen: Just a minute.

Mr. Banfield: I think that answers the question. If he is getting a little off the exact question——

Q. Who owned these boats and scows?

A. The Sommers Construction owned some; the Astoria Puget Sound Canning Company, and there were some fishing boats.

Q. Let me ask this in summary: Were they all owned by somebody other than the Juneau Spruce Corporation? A. Right.

Q. Were there any boats or barges of the Juneau Spruce Corporation loaded at the mill?

A. Yes, I think there was a barge and a boat, the "Santrina" I believe.

Q. Who loaded those?

A. Juneau Spruce employees.

Q. And where did those employees who loaded the "Santrina" and the barge owned by the Juneau Spruce, where did they work?

A. They worked both on the dock and on the boat and on the scows.

Q. They were regular, steady employees?

A. That is right.

Q. Mr. Schmidt, were you ever visited, while employed by the Juneau Spruce Corporation, by

(Testimony of George B. Schmidt.)

any representatives of the International Longshoremen's and Warehousemen's Union?

A. Yes, I was.

Mr. Andersen: I move that be stricken as calling for a conclusion and opinion of the witness.

The Court: If he was ever visited?

Mr. Andersen: Yes, your Honor. I couldn't go down and buy an automobile and say Judge Folta asked me to buy the automobile.

The Court: He isn't attempting to state hearsay; it is his own experience.

Mr. Andersen: It is a conclusion. I make the objection as one of my basic objections. I am sure your Honor understands.

The Court: Same ruling.

Mr. Andersen: I would like to have a foundation laid.

Mr. Banfield: That is what I am starting to do.

The Court: Proceed.

Q. When was this visit?

A. I think along about October 2, 1947.

Q. And where did the visit take place?

A. It took place in the office of the Juneau Spruce Corporation.

Mr. Andersen: I will object to this too, may it please the Court. It is too far in point of time; too remote.

The Court: Objection overruled.

Q. Who was this representative, or who did he represent himself to be?

(Testimony of George B. Schmidt.)

A. Mr. Bulcke. I think he was Secretary of the Longshoremen's Union. [512]

Q. Do you know his first name?

A. No, I don't.

Q. Would you recognize it?

A. I think I would.

Q. Was it Germain Bulcke?

A. I couldn't say.

Q. Did he come there voluntarily, or did you request him to come?

A. No. He came there with some of the local longshoremen.

Q. Tell us what Mr. Bulcke said at that time.

Mr. Andersen: Same objection, your Honor.

The Court: Objection overruled.

A. He demanded that we place three additional men——

Mr. Andersen: I move that be stricken, may it please the Court. The question was what was said.

The Court: If you can, state the language used—the exact language used, and you should do that rather than state your own opinion.

A. He said he wanted to place three additional men on the longshore payroll to do the work, to do the work that the Juneau Spruce Corporation men were doing at the time. He called it "make ready work." He was demanding—he was asking—he said they wanted to take the lumber from the place of rest that it was at the time the boat got into port and it had been the custom to deliver the lum-

(Testimony of George B. Schmidt.)

ber [513] under the slings, and from that point on the longshoremen took it aboard, but he wanted to vary from that course and assume the jurisdiction over the lumber at the point at which it rested when the boat came in.

Q. What distance would there be from this point of rest when the boat came in and the point at which the longshoremen were in the habit of taking it over?

A. It would depend on where the storage was. Sometimes it was in the lower yard; sometimes in the upper yard. We had a carrier with a lift-fork and we put it on the floor level or the yard level and then transported it with a carrier to alongside the ship.

Q. Now in doing this particular work, just which parts of that operation did he want the longshoremen to do?

A. He wanted to put the carrier blocks, put them down where we set the load down with the lift-forks—he wanted to put the carrier blocks under that and wanted another longshoreman to take the carrier blocks away when their slings took possession, and put it aboard the boat, and he wanted a boss to boss the two doing this work.

Q. Could that be described in this way to get it clear to the jury: you have to use two different types of machinery? A. Yes.

Q. One to take it off and set it on the carrier block? [514] A. Yes.

(Testimony of George B. Schmidt.)

Q. And the other to the face of the dock?

A. Yes.

Q. What he wanted was a man to put the carrier block under the load before the lift-truck dropped it on the dock? A. That is right.

Q. And another man, after it arrived at the face of the dock, and after it was hoisted aboard the vessel, to take the carrier block and throw it aside?

A. Yes.

Q. And he wanted a boss for what?

A. Foreman or boss for those two men.

Q. What did you say in reply to this request?

A. I told him that I didn't think that was common practice, and asked if they were doing it at Sitka and Ketchikan and all along the Coast. He said they were. I said I would have to investigate that, so I did.

Q. What did you find out?

A. I wrote a letter to the Columbia Lumber Company and the Ketchikan Spruce Mill and a letter to the Coos Bay Lumber Company and all three denied it.

Mr. Andersen: I move that be stricken.

Q. What was the result of your investigation?

Mr. Andersen: I move that all be stricken as merely hearsay, may it please the Court. [515]

The Court: You may answer whether, from your investigation, the representation made was true or false.

Mr. Andersen: I also want to add the objection

(Testimony of George B. Schmidt.)

to this entire line of questioning as immaterial, and on this particular one also the best evidence objection, your Honor.

The Court: Objection overruled.

A. What was your question?

Q. What was the——

Mr. Andersen: Are those objections overruled, your Honor?

The Court: Yes.

Q. Was the representation made by Bulcke regarding this practice true or false?

A. It was false.

Mr. Andersen: The same objection, and to the answer.

Q. Did you ascertain that his representation was false as the result of your investigation?

Mr. Andersen: I object.

A. Wholly, as I have already told you, by letters from the various people I wrote to, and they denied it.

The Court: Did you communicate that fact to Mr. Bulcke?

A. No, I did not.

Q. Did Mr. Bulcke ever return?

A. No; he didn't talk with me, at least. I didn't see him [516] again.

Q. Did he send anyone to you to follow up on this demand?

Mr. Andersen: I object to that as calling for hearsay.

(Testimony of George B. Schmidt.)

Mr. Banfield: I am asking if he was contacted by anyone on it.

The Court: Objection overruled.

A. No; not in that—not with the request.

Q. What do you mean by that?

A. Well, they endeavored to take action——

Mr. Andersen: I move that be stricken, may it please the court, as not responsive to any question and calling for a conclusion and opinion of the witness.

Mr. Banfield: If the Court please, we are going to show here the next thing was not any request, but it was some other action; in other words, as a result of this or after this, rather—. I wouldn't say result—but in any event, I am going to show the facts, what happened after Mr. Bulcke left. The first fact, I am going to show that it was false, and I am going to show what was done next by the parties, not something said or heard but some physical thing done.

The Court: I think the objection was to the form the answer was taking, and perhaps premature—I don't know.

Mr. Banfield: I will withdraw the question.

The Court: I might say for the benefit of the witness that what was done is what should be testified to, if possible, rather than what was said, unless he is directly asked and it is permitted as to what somebody said.

Q. Mr. Schmidt, what was done after that with respect to carrier blocks?

(Testimony of George B. Schmidt.)

A. Well, the next boat that came in—it was probably ten days or two weeks, I can't tell the exact dates—but the longshoremen put three men to do that work which Mr. Bulcke had asked that they do, without our hiring them.

Q. They just came down?

A. They just came down.

Mr. Andersen: I move that any reference to Mr. Bulcke be stricken and also the answer, as incompetent, irrelevant and immaterial. I might add to the Court, about three witnesses testified as to the blocks on the dock. They weigh about fifteen pounds and had to be laid aside.

The Court: Is this witness attempting to connect Mr. Bulcke with it.

Mr. Andersen: I don't know.

Mr. Banfield: Mr. Card testified they asked to be paid as he arrived in Juneau. Mr. Hawkins testified he was out of town and Mr. Schmidt told him about it, but he didn't know what actually happened. I am getting at what actually happened.

The Court: The witness is asked, or is attempting to connect what occurred there subsequently with the request made by Mr. Bulcke, so the objection is overruled.

Mr. Andersen: Could I have the time stated?

The Court: Yes; the time ought to be fixed.

Q. Do you know the exact date?

A. No, I don't. I know it was the next boat following that interview I had with Mr. Bulcke on October 2.

(Testimony of George B. Schmidt.)

Q. Would it be less than a month?

A. Yes.

Q. Would it be less than two weeks?

A. I couldn't say.

Mr. Andersen: I move all that be stricken as immaterial and too far remote in point of time.

The Court: Objection overruled.

Q. Will you tell us your best estimate of how long it was after Mr. Bulcke's visit?

A. A little over ten days, and probably not over two weeks; I couldn't say for sure.

Q. Did these men actually perform the work as you described before?

A. They actually performed that work.

Q. Did the Juneau Spruce Corporation pay them for it? A. No, sir.

Q. Now, at the time these men performed this work, what kind [519] of boat was this that was being loaded?

A. A steamer; Alaska Steamship steamer.

Q. Was the lumber hoisted aboard with the steamer's winch and crane? A. That is right.

Q. And did the mill's employees, regular employees, move the lumber to the face of the dock?

A. Yes.

Q. And who attached the slings to the lumber?

A. You mean out at the dock? The longshoremen.

Q. Did the Juneau Spruce Corporation pay those longshoremen? A. Not the slingmen; no.

(Testimony of George B. Schmidt.)

Q. Was any special charge made for that particular work by the steamship company?

A. No. You mean against the Juneau Spruce Corporation?

Q. Yes. A. No.

Q. Now, Mr. Schmidt, in October, 1947, were there any other representatives of the I.L.W.U. or Local 16 who called on you?

A. Yes; along about the twenty seventh of October, as I recall it, there was a committee called upon me.

Q. Where did they call on you?

A. At the Juneau Spruce Corporation's office.

Q. Who was present at the time they called?

A. What do you mean? I was in charge and Mr. Hawkins was away.

Q. Do you remember what month that was?

A. October, I believe—October, 1947.

Mr. Andersen: I thought he said October 27.

A. He asked what month. You asked what month?

Q. Yes; and you said October, 1947.

A. Yes.

Q. Mr. Schmidt, I show you here Plaintiff's Exhibit No. 5 for identification, and ask if you wrote this letter.

Mr. Andersen: Before you ask any other questions, will you lay a foundation as to who was present, please.

A. Yes; I wrote this letter.

(Testimony of George B. Schmidt.)

Mr. Banfield: Do you mind if I ask what date is on the letter?

Mr. Andersen: No.

A. October 18.

Q. 1947? A. Yes.

Q. And who was present at the meeting which you have just described as occurring in October, 1947?

A. You mean of the Juneau Spruce Corporation employees or——

Q. I mean everyone who was present.

A. I don't remember who the men were. I know at the time I wrote the letter—it was officers of the Longshoremen, [521] and there were three of them, and I don't—I can't exactly name them. I knew the men and knew they were the officers at that time, but as I say, it is a couple of years now and I don't know their names, and it seems to me it was Ford and McCammon, and I don't remember whether Burgo——

Q. Burgo?

A. I think he was one of them, too, if I am not mistaken, but I couldn't swear to that.

Q. Who else was present? A. That is all.

Q. Of course, you were present? A. Yes.

Q. Do you know, after examining Plaintiff's Exhibit 5 for identification, the exact date this occurred?

A. Of course that was on the date I wrote that letter, and that is a copy of it. I know that.

(Testimony of George B. Schmidt.)

Q. What was the date?

A. October 18, 1947.

The Court: Is the purpose—or do I understand the witness has fixed the date at October 18 instead of the twenty seventh?

Mr. Banfield: That is right, your Honor.

Q. Tell me, what did the longshoremen say?

A. Well, we had a lot—— [522]

Q. What did they say?

A. They objected to the Company loading.

Mr. Andersen: May I ask that that be stricken and ask him to respond to the question by what was said? I think it would be preferable.

The Court: You should say, if you remember the exact—or repeat the exact language—rather than giving your opinion as to the effect of the language.

Q. Do you remember the exact words?

A. I don't remember the exact language.

The Court: The substance and effect?

A. They said they wanted the loading of the "Santrina"—that is the boat that belonged to the Juneau Spruce Corporation—and we had loaded it with fish boxes in breakdown and they said they felt that was their work and objected to the loading that we had done on that boat.

Q. You said something about breakdown—what do you mean?

A. I mean box shook, not put up in boxes—it was the pieces that make the boxes.

(Testimony of George B. Schmidt.)

Q. They objected to the Juneau Spruce Corporation's regular employees loading it? Is that it?

A. Yes, that is it.

Q. What did you say to them?

A. I told them it was our own boat and we felt that was our employees' work, and they stated that they felt that [523] everything that went over the rail was their work.

Q. Was anything further said?

A. I wrote this letter to Mr. Hawkins and put it in his lap.

Q. That was the end of the conversation?

A. That is right.

Q. I ask you, Mr. Schmidt, to read the last paragraph of that letter, with particular reference to what was actually loaded at that time.

A. "Yesterday the C.I.O. Longshoremen's Union representative——"

Mr. Andersen: I think he meant to read it to yourself.

Q. Just read it to yourself. Does that refresh your memory?

A. Yes, that refreshes my memory all right.

Q. Now, what was actually being loaded?

A. That was a scow that went to Prince Rupert and that was on our own equipment; that is, it was on the equipment of the Juneau Spruce Corporation, and was for trans-shipment from Prince Rupert by rail.

Q. Do you know, Mr. Schmidt, when, or during

(Testimony of George B. Schmidt.)

what period of time, during the operations of the Juneau Spruce Corporation, were longshoremen hired as you described before?

A. Well, from its inception as a corporation to October.

Q. Of what year? A. Of 1947. [524]

Q. And were there very many times when longshoremen were hired—how numerous were they?

A. There were not very many times that they were hired—probably, oh, just an estimate—probably ten or twelve times.

Q. Now, during this period that longshoremen were employed by the Juneau Spruce Corporation, who actually did the employment, who hired them?

A. I did.

Q. Did anyone else ever hire them?

A. Not to my knowledge.

Q. Now, did you have anyone assisting you at that time?

A. Yes—Stamm, Mr. Stamm was helping. He may have at my instigation, asked somebody to come in if I had to go out and wasn't able to get in touch with the longshoremen and had to go out around the plant. I may have delegated him to make the request of the longshore office, and I don't recall any specific time.

Q. Would you know about it every time they were hired? A. Oh, yes.

Q. Mr. Schmidt, when this incident occurred of the longshoremen coming down and doing carrier

(Testimony of George B. Schmidt.)

block work, do you know who those longshoremen were—who those men were? A. No, I don't.

Q. You don't know if they were the same ones that came at [525] the same time Mr. Bulcke was there? A. No, I don't.

Q. Do you know if those that came October 2 with Mr. Bulcke were the same persons that came October 18 to see you about the loading of the barge?

A. I couldn't identify them now.

Q. You don't remember now who they were?

A. No.

Mr. Banfield: If the Court please, I just want to check the complaint here and see if the allegations are the same as from previous testimony.

Q. Mr. Schmidt, where did the Juneau Spruce Corporation get its supplies of logging equipment, etc.? A. Mostly out of Seattle.

Q. And were they shipped to the plant here at Juneau?

A. Some were—what do you mean? Delivered at the plant?

Q. Yes.

A. Some, but very few of them. Most of them were shipped to the steamship dock.

Q. Then what happened to them?

A. Then we would have to pick them up from there.

Q. Where was the larger portion of lumber sold that was produced in 1947?

A. The larger portion was sold to the Army, to the U. S. Engineers. [526]

(Testimony of George B. Schmidt.)

Q. Was that during the entire year of 1947?

A. No; up until October.

Q. And after October?

A. Then we sold most of it down in the States, then.

Q. What method did the Juneau Spruce Corporation have in 1947 for disposing of its lumber; that is, what transportation system was used—water, rails, roads, etc.

A. Starting with the Army, after the lumber left the planing mill we delivered it on our dock to Army blocks—they had their own blocks—we set it on their blocks. They had their own carriers, and took it over to the Engineers' base.

Q. And after the Army quit buying in 1947 how was it transported?

A. We put it up in sling load lots. If we had an order for one million feet we prepared as much as we could and stacked it in the upper or lower yard, where we had facilities. When a ship came in we delivered it alongside the ship. The carriers——

Q. Where would the ship be from?

A. Seattle or the Westward, if we shipped to our own yards.

Q. I am going to ask some questions that may seem silly, but they are necessary. Are there any roads between Juneau and the places where the lumber was sold in the States? [527] A. No.

Q. Are there any roads between Juneau and any

(Testimony of George B. Schmidt.)

other town in Alaska? A. Except Douglas.

Q. You say "except Douglas." What do you mean?

A. There are no roads connecting no other towns with Juneau except the road to Douglas.

Q. Are there any railroads serving Juneau, Alaska? A. No.

Q. What method of water transportation was necessary in the operation of this business, if any?

A. Well, we had to either have steamboats, steamships or scows—either one.

Q. Now, Mr. Schmidt, do you know whether steamship service was interrupted in 1947?

A. Yes, there was a strike.

Q. Do you remember during what period of time it lasted?

A. It was from August, September, and I think a part of October, if I recall.

Q. Was there any regular steamship service between Seattle and Juneau in the fall of 1948?

A. Well, there was an interruption of service there on account of the strike; yes.

Q. During what period?

The Court: He has already answered that.

Mr. Banfield: No; not in 1948. That was 1947.

A. I don't recall the months now.

Q. Mr. Schmidt, in your services for Columbia Lumber Company at the present time, do you have any knowledge——

(Testimony of George B. Schmidt.)

Mr. Andersen: Could I interrupt? I didn't get the first part of your question, counsel.

Q. In doing your duties as an employee of the Columbia Lumber Company, do you have any knowledge of the operations of the Columbia Lumber Company in Sitka? A. Yes.

Q. Are you intimately acquainted with those operations? A. Well, yes.

Q. Do you know exactly what they do?

A. Yes.

Q. Have you been over there recently?

A. No.

Q. How many times have you been over there?

A I haven't been over there. I only know what they are doing from daily reports we get.

Q. From who?

A. The mill in Sitka.

Mr. Banfield: I don't believe the witness is qualified to testify as to what I wish, your Honor. That is all. You may cross-examine the witness.

Cross-Examination

By Mr. Paul:

Q. Mr. Schmidt, when you were describing your duties with the Juneau Lumber Mills you mentioned you were Vice President and Assistant Manager?

A. That is right.

Q. Was that your position at the end of the Juneau Lumber Mill operation here?

A. That is right.

Q. You don't mean that you had been Vice

(Testimony of George B. Schmidt.)

President and Assistant Manager ever since 1937, do you?

A. No. The first of 1939—from 1939 up to that time, I had been the accountant; 1937, 1938 and 1939, I was accountant and from then on, Vice President and Assistant Manager.

Q. And who was Vice President before you?

A. He is still a Vice President—F. E. McDermott.

Q. Do you know a J. McDermott?

A. That isn't J.—it is an F. E. If you look at his signature it looks like "J." but is F. E.

Q. Then some mistake might be made in typing?

A. Francis E.—it looks like J.

Q. Are you acquainted with Tom Gardner?

A. He was also—he sold out in 1939. He was part owner.

Q. Before we leave Mr. McDermott, do you say he was Vice President before you and continued on as one of the Vice [530] Presidents along with you? A. That is right.

Q. And when did his connection with the Company cease—the Juneau Lumber Mill?

A. It didn't cease until they sold out.

Q. April 30, 1947—for all practical effects?

A. Yes, that is right.

Q. While Mr. Gardner was connected with the Juneau Lumber Mills, did he occupy a position——

Mr. Strayer: If your Honor please, I am going

(Testimony of George B. Schmidt.)

to object to the question. I don't know where he is going or what the relevancy is. We didn't go into any of the operations of the Juneau Lumber Mill with this witness, and it doesn't appear to be proper cross-examination.

The Court: It doesn't appear to be within the scope of cross-examination.

Mr. Paul: It is preliminary, your Honor. I am asking first, your Honor, what this witness knows about. He was Assistant Manager and Vice President of the Juneau Lumber Mills—about his concern.

The Court: He wasn't asked anything about the Juneau Lumber Mills, as I recall.

Mr. Paul: He was asked, your Honor, about the practice of the Juneau Spruce Corporation.

The Court: Yes. [531]

Mr. Paul: I am entitled to ask whether that practice of the Juneau Spruce Corporation was the same practice and always existed or if there was a new practice, which he entitled or characterized as the Juneau Spruce Corporation's hiring longshoremen.

The Court: It would appear to be part of your own case and not cross-examination.

Mr. Paul: It places his testimony in a proper relation. I am certainly entitled to do that.

The Court: It might do that, but an objection is raised. This witness was called to testify to the operations of plaintiff, and not its predecessor, and

(Testimony of George B. Schmidt.)

there has not been an examination of the operation of its predecessor, and it is not within the scope of the direct examination, and it would appear, therefore, to be part of your case in chief.

Mr. Paul: I am also examining him for this purpose: that in the meeting of—the one at which Mr. Bulcke and Local 16 were present—the testimony, as it stands now, may lead one to draw inferences of a false representation. I am entitled to show that other inferences can be made.

Mr. Strayer: If the Court please——

Mr. Paul: And I have to go into the Juneau Lumber Mill practice to do that.

Mr. Strayer: The representations the witness testified to were at Sitka, Ketchikan and another place I don't [532] recall that longshoremen were doing the work Mr. Bulcke claimed here. It has nothing to do with the Juneau Lumber Mill.

The Court: Although the Court believes in being rather liberal in such matters—but it seems as against the objection that this could not possibly be proper cross-examination. The objection is sustained.

Q. At the time the Juneau Spruce Corporation took over, Mr. Schmidt, how many lumber carriers —by the way, what is the proper name, lumber carriers or hoists?

A. Lumber carriers. Some call it a hoister truck, but lumber carrier is what it most commonly is known as.

(Testimony of George B. Schmidt.)

Q. A four-wheel motor driven truck set way high in the air? A. Right.

Q. And carries a stack of lumber in between the wheels? A. Right.

Q. At the time the Juneau Spruce Corporation took over, did they take over any lumber carriers?

A. They took over all the assets of the corporation.

Q. I just want the number of lumber carriers they took over.

A. I think they took over three, I believe.

Q. And did the Juneau Spruce Corporation acquire any more lumber carriers?

A. Not to my knowledge.

Q. What were those lumber carriers used for around the yard? [533]

A. Transporting lumber from one place to another.

Q. For instance, in loading a ship—what function would the lumber carrier fulfill?

A. They delivered the lumber under the ship's sling.

Q. They would run into the yard, straddle a load there that was in position already, pick it up and run out to the face of the dock? A. Right.

Q. Where they would drop it again on a carrier block?

A. It was on the carrier block. They don't drop it on. They drop the block and all.

(Testimony of George B. Schmidt.)

Q. They carry their own carrier blocks with them?

A. They have to have it to get the lumber on. It goes under the block and lifts the block and the load all in one operation.

Q. And then deposits it at the face of the dock where the sling is attached?

A. That is right.

Q. Now, when Mr. Bulcke talked to you with members of Local 16 about doing some of this, about three of the men doing some of this work relating to carrier blocks, was any mention made of loading of two-wheel trucks? A. No.

Q. Or at any time, that two-wheel trucks had been loaded by longshoremen? [534]

A. The Juneau Spruce Corporation had no two-wheeled trucks. They discarded them.

Q. I am talking about at any time.

Mr. Strayer: I object to anything that preceded the take-over.

Mr. Paul: I don't mean to be presumptious. I believe it is entirely within the ruling of the Court —though counsel feels I am pursuing the same reasoning, it is the same reasoning, but I am proceeding from a different viewpoint. I am trying to determine what the full extent of the conversation was between Bulcke and Local 16 on the one hand and George Schmidt on the other hand.

The Court: That is entirely proper. What is your question?

(Testimony of George B. Schmidt.)

Q. Was there any talk at the time Mr. Bulcke was there with Local 16, on the one hand, and you on the other—this was about October 2, 1947—about the loading of two-wheeled trucks at this plant? A. No.

Q. At any time?

Q. What do you mean by "any time"?

Q. Any time within your knowledge; that would be since 1937.

Mr. Banfield: If the Court please, it is the conversation of October 2. He is now asking for conversation about the Juneau Lumber Mill since 1937. It is not proper [535] cross-examination.

The Court: If he has reason to believe that that was part of the conversation, he has a right to bring it out. I don't know if he has any reason.

Mr. Banfield: He was questioned about what was said by Mr. Bulcke as to whether they used two-wheeled carts, but not what was done in 1937.

The Court: The question is to what the conversation there was.

Mr. Paul: On October 2, 1947.

A. Am I to answer, your Honor?

The Court: Yes.

Q. Yes.

A. Nothing was said about two-wheeled carts.

Q. Was there anything said at this meeting on October 2, 1947, about the loading by longshoremen of any type of vehicle at this sawmill, other than lumber carriers? A. No.

(Testimony of George B. Schmidt.)

Q. At any time I am talking about, at this plant?

Mr. Strayer: You are talking about the conversation of October 2 with Mr. Bulcke about the loading of trucks, is that right?

Mr. Paul: That is right.

A. Nothing, to my knowledge.

Q. Whether it was mentioned in the conversation or not, Mr. [536] Schmidt? Wasn't it understood by you and the longshoremen?

Mr. Strayer: I object.

Mr. Paul: It is cross-examination. I can ask for an understanding.

Mr. Strayer: Obviously this witness can't testify to an understanding the longshoremen had. He might testify as to what was in his own mind.

The Court: True; but on cross-examination if he wants to ask a question of that kind, it is not improper. Objection overruled.

A. Will you please repeat the question?

Q. Irrespective of whether anything was definitely said in the conversation, was it understood by you and by the longshoremen that there had been considerable work done in the past by the longshoremen in transporting lumber from the yard to the face of the dock at the sawmill?

Mr. Strayer: I object to that now on the ground that counsel obviously is referring to the predecessor company, the Juneau Lumber Mills. It is not proper cross-examination. He is not talk-

(Testimony of George B. Schmidt.)

ing about any conversation but about some knowledge the parties had at the time of the conversation.

The Court: The witness testified that when this demand was made on him he had to make inquiries other places because he didn't know there was any such practice, and of [537] course he may be cross-examined on that.

Mr. Strayer: That practice he made inquiry of was a practice of hauling lumber to the bullrail at Sitka, Ketchikan, and one other place.

Mr. Banfield: It was as to the carrier blocks.

Mr. Strayer: The carrier blocks.

Mr. Banfield: Carrier blocks, other places.

The Court: My recollection of the testimony is that the longshoremen demanded the work of moving the lumber from the place of storage to the rail.

Mr. Strayer: If the Court please, I must take an exception. I will refer to the record or ask the witness.

Mr. Banfield: What they wanted was after the mill employees lifted it and dropped it to the deck, they wanted a longshoreman to be there so that when it was dropped he could put a carrier block under it, and another longshoreman at the bullrail to pick up the carrier block when the hoist went away, and there was no representation by Mr. Bulcke to transport it; it was for one man to put the block under it and one man to pick up the block.

(Testimony of George B. Schmidt.)

Mr. Andersen: Your Honor is clearly right. It was testified that on October 2 Mr. Bulcke came and suggested to Mr. Schmidt that they be permitted to handle it from the last place of rest in the yard to and on the dock. That is what Mr. Schmidt testified. There is no question about it.

The Court: I think so too.

Mr. Andersen: Isn't that right?

A. No; what he demanded—he called it "make ready" and the make ready portion was to put those blocks underneath the loads after they were taken from the lift-forks.

Mr. Andersen: May it please the Court, my notes show clearly—I keep correct notes, your Honor—that when Mr. Bulcke came in in the early part of October he talked to Mr. Schmidt about handling the lumber from the last place of rest out of the yard to down on the dock and on the boat. Mr. Schmidt testified to that at first, I believe, or we can have the Reporter read the record.

A. There was no other means of transportation at that time except the carriers.

The Court: Well, if counsel think it is of such great importance, we will have the record read.

Mr. Banfield: I will ask that the record be read on that entire subject.

Mr. Andersen: I don't say it is so important—maybe it is. I have it in black and white.

Mr. Banfield: If the Court please, this might have been what happened——

(Testimony of George B. Schmidt.)

Mr. Andersen: Shouldn't the facts——

Mr. Banfield: He probably said what he wanted was the make ready work from the last place of rest to the bullrail. [539] All right. What is make ready work? What did he mean by that, and what did Mr. Bulcke say? He said he wanted—he stated he wanted to—a man to put the block in place and a man to throw it in the pile when they were through with it, and a foreman over them.

The Court: Is there——

Mr. Andersen: If they want to change that, Mr. Hawkins, may it please the Court, testified they wanted to move it from the last place of rest on the dock down to the—in the yard to the rail. Then you will recall the testimony that Mr. Albright came in and talked to one of the managers and said "I think that is a little unreasonable. I think all the longshoremen here should ask for is from the bullrail out, or the dock out." All the witnesses testified that the longshoremen wanted to take it from the yard down to the dock and from there on. Mr. Albright said he thought it should be modified and it should be only from the dock out. I think that is what was testified to. If you want to strike it, let's have it from the dock out. We will be satisfied.

Mr. Banfield: It is quite important to show the inconsistency of the longshoremen at different times and by different persons. That is what I am showing here.

(Testimony of George B. Schmidt.)

Mr. Paul: I am willing to show by the same theory that it is not inconsistent. [540]

The Court: I was in hopes counsel would agree that after all, there is no dispute to amount to anything of what the parties to this controversy demanded, and that if so, would make it unnecessary——

Mr. Andersen: Correct, your Honor.

The Court: To go into this.

Mr. Andersen: I think it is perfectly clear that on April 10 according to the I.W.A. and all the witnesses for the plaintiff so far, the work the longshoremen asked for on that day and the work the I.W.A. was perfectly willing to turn over to the longshoremen, was moving cargo from the dock out. That is what was testified. There doesn't seem to be any argument on it.

The Court: That is the way it strikes me. Is it inconsistent or different from a later or earlier time?

Mr. Banfield: That is right.

The Court: It might be due entirely to concessions.

Mr. Banfield: And there might be entirely different factors. Before this is over I intend to show the practice in this community.

The Court: The only way to resolve this particular dispute, unless counsel can agree, is to have the Reporter read the record.

Mr. Andersen: How long does a person have to

(Testimony of George B. Schmidt.)

remain in the Territory before he can vote? [541]

The Court: Do you expect to be here long enough?

Mr. Andersen: I am afraid so, your Honor.

The Court: Well, I think you joined in the request.

Mr. Andersen: I am perfectly willing to rest it on the statement of the Court and save time. I think the Court stated it eminently correctly. So far as we are concerned, we will forget the record at this point.

Mr. Banfield: We will too, so long as you don't examine on any claim.

The Court: Do counsel agree that the reading of the record may be dispensed with?

Mr. Banfield: We agree, your Honor. They can cross-examine this witness as to what Mr. Bulcke said and cross-examine about the work of placing carrier blocks and the jobs the foreman was to do.

The Court: You may proceed.

Mr. Paul: Am I allowed to resolve any inconsistencies?

The Court: Do you remember the last question?

Mr. Paul: Was there an understanding?

Mr. Andersen: Just a second.

Q. In your conversation, in which Bulcke and Local 16 were on one side and you were representing the Company, Mr. Schmidt, was there any talk of past practice at this particular plant?

A. No. [542]

(Testimony of George B. Schmidt.)

Q. Was there any discussion between the two groups as to whether this use of carriers was a new practice? A. No.

Q. I am going back, even to the necessity of going back in your memory as much as five years——

Mr. Banfield: If the Court please it wasn't said five years ago, it was said October 2.

Mr. Paul: It depends what he understands we mean by past practice.

Q. As much as five years?

A. Nothing was said by Bulcke about anything in the past. It was the present situation.

Q. I am talking about the longshoremen too that were there with him.

A. No. Bulcke did all the talking.

Q. Was there any offer of negotiation made, request to bargain made, by anyone present there?

A. No; just a statement of what they wanted.

Q. It was assumed that bargaining would take place and then it got down to what you were going to bargain about, was that the situation?

A. No. I told them I would have to take it up with different people to find out whether that was common practice.

Q. You were willing to talk to Mr. Bulcke and Local 16?

A. Well, I talked with them, but I didn't agree to take any [543] action toward letting them have that work.

(Testimony of George B. Schmidt.)

Q. In other words, you wanted to find out whether the actual offer that he had made, as you sometimes call "demand," the actual offer he made could be supported by evidence?

A. That is what I was trying to find out; yes.

Q. I believe you testified that thereafter you had not heard any similar request or demand or offer by the longshoremen? A. No.

Q. Apparently it was abandoned?

A. It wasn't abandoned.

Q. I mean by the longshoremen? A. No.

Q. What do you mean by that?

A. I told you—I think I testified on the next boat that came in that——

Q. Outside of that one event.

A. But that took place after the conversation.

Q. It never happened again? A. No.

Q. Who was the Manager when the Juneau Spruce Corporation took over on May—it was midnight, April 30, 1947? A. Mr. Hawkins.

(Whereupon Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the [544] jury all present in the box; whereupon the witness George B. Schmidt resumed the witness stand and the trial proceeded as follows:)

Cross-Examination

By Mr. Andersen:

Q. Just a few questions, Mr. Schmidt. On or

(Testimony of George B. Schmidt.)

about the second when Germain Bulcke came in and had a talk with you——

A. I wasn't sure of his name, but it was Mr. Bulcke.

Q. The man you referred to, whatever the name is, in any event. A. That is right.

Q. He came in with somebody from Local 16?

A. Right.

Q. He told you they wanted to discuss the longshoremen's responsibilities?

A. He stated what responsibilities they wanted to talk about.

Q. He told you the longshoremen here would like to move the lumber from the last place of rest down to the dock and thence over the rail onto the boat?

A. The make ready portion; he didn't intend that the men should use the lift-forks or the carrier, but place the blocks for it.

Q. To move it on the dock?

A. To move it on the dock, and take the blocks away from under the load after the load was lifted.

Q. And take it over the rail onto the vessel?

A. That is right.

Q. Whatever type of vessel it may be. I assume the discussion lasted five, ten, fifteen, twenty minutes? A. Right.

Q. You said you would make no decision and would discuss it with other people?

A. Investigate it.

(Testimony of George B. Schmidt.)

Q. And that, in effect, was the end of it?

A. Yes.

Q. You never saw Mr. Bulcke from that day to this? A. That is right.

Q. In the same conversation, you talked about the blocks on the dock—moving the blocks away?

A. Part of it was that one man would put them under and one man would take them away, and then a boss.

Q. The blocks run fifteen pounds or thereabouts? A. Yes.

Q. The reason they are moved away is that the work is done fairly quickly, as quickly as it can be done, and they might get in the way of the carriers, and so they have to be moved away?

A. Yes, but of course, I understood part of a slingman's job was to move them.

Q. They have to be moved? [546]

A. Yes.

Q. They belong to you? A. Yes.

Q. And if they are not moved fairly quickly a carrier coming out might run into them?

A. Right.

Q. Is there a blind spot on those carriers?

A. I have never been up on one; I couldn't tell you.

Q. The driver sits about ten feet high in the air?

A. Probably that much.

Q. He sits on one side of it? A. Yes.

Q. Front or rear?

(Testimony of George B. Schmidt.)

A. He sits in front; it goes either way, so I couldn't tell you.

Q. One time on the rear and another time on the front? A. Yes.

Q. So, when riding on the rear it is difficult to see everything in front, particularly off to the odd side? A. Right.

Q. Unless the blocks are removed they are a great hazard? A. Yes.

Q. They wanted them picked up quickly and moved away?

A. I don't think that was the purpose of their request.

Q. Is that what they said? [547]

A. They said they wanted the placing and removing, the getting ready.

Q. After the load was on the dock they wanted to move these things out of the way?

A. Right.

Q. And, of course, get paid for it?

A. Right.

Q. They were your blocks and were used time after time, over again?

A. That was the job of the slingmen. That is past practice. The slingmen remove those blocks when the load is lifted.

Q. In any event, they asked you for this work?

A. That is right.

Q. And then that completes the conversation?

A. Right.

(Testimony of George B. Schmidt.)

Q. From that time, you never saw Mr. Bulcke again? A. Right.

Q. Sometime after that, around the middle of October, you had a conversation with some men from Local 16? A. Right.

Q. They came down and talked to you about loading all the water-borne commerce?

A. Yes.

Q. Your barge, or your barges, or both? Isn't that true? A. Yes. [548]

Q. You personally had been hiring longshoremen down there for many years, hadn't you?

Mr. Strayer: I object. It is not proper cross-examination. It should be only the Juneau Spruce Corporation.

The Court: I think that the question is not objectionable on that ground. Objection overruled.

A. Yes, sir.

Q. And as I understand it, you had worked for the Juneau Lumber Company some number of years and you stopped working for them on April 30, the last day of the month, and immediately switched over and went to work for the Juneau Spruce, July 1, the following month?

A. Yes.

Q. And there was no difference in the manner in which longshoremen were hired?

Mr. Strayer: The same objection—it is not proper cross-examination.

The Court: I think this is different. I think

(Testimony of George B. Schmidt.)

the question before was to the operations of the predecessor company, but this witness testified that when this demand was made for this work, that he had to inquire elsewhere as to what the practice had been, from which the inference would naturally be made that that certainly had not been the practice, so far as he knew, and therefore that point is open to inquiry. Objection overruled. [549]

A. Will you repeat the question?

Mr. Andersen: I want to be fair to the Court. We have different things in mind.

The Court: My ruling is——

Mr. Andersen: May I withdraw the question? I would be sort of taking an advantage. May I withdraw it?

Q. This conversation you had with a delegation from Local 16 sometime in October—they had a discussion with you about the manner in which longshoremen were hired, didn't they?

A. They were——

Q. Could I suggest this, Mr. Schmidt? That you sort of answer the questions first, then if there is an explanation, if it is necessary, you can give it?

A. No.

Q. Were these men you had seen working on the dock there from time to time over a period of years?

A. Yes.

Q. You say you knew them?

A. I knew them.

Q. All these men had been down working on this

(Testimony of George B. Schmidt.)

particular dock, hadn't they, from time to time?

Mr. Strayer: I submit that is not proper.

Mr. Andersen: I submit it is eminently proper.

The Court: Objection overruled. [550]

Q. These men had been down working on the dock there from time to time?

A. Yes, they had.

Q. What they in effect told you was that they would now like a contract from the Juneau Spruce Corporation, the same type of contract they had had with the Juneau Lumber Corporation for the loading of all of this water-borne commerce?

A. They didn't make any demand for a contract. The only specific demand was specifically for the work we had done in connection with that barge.

Q. In other words, didn't they tell you they had been doing all longshore work in this vicinity, and the loading of barges was really their work, and they felt it belonged to them?

A. No; that wasn't the conversation at that time. They just said that was their sentiment toward that particular barge and they felt they should have jurisdiction over everything that went over the rail onto those barges.

Q. They told you that due to the manner in which they had been working here in Juneau that they felt the loading of any type of water-borne commerce over the dock or over the bullrail, as you have intelligibly expressed it, was longshore work and they should have it?

(Testimony of George B. Schmidt.)

A. They didn't put it that way. [551]

Q. Substantially?

A. No. They didn't refer to anything as previous practice, to any previous practice at all.

Q. But you had been hiring these men for years, hadn't you? A. Yes, I have hired men.

Q. When you talked to them you knew that they were there to talk about doing the same type of work they had done for years; that is, loading barges and boats, isn't that true?

A. I wouldn't think so; no.

Q. Tell me, had you ever had a delegation of longshoremen talk to you at any previous time regarding work? A. Not of that nature.

Mr. Banfield: We object to any cross-examination except what was brought up on direct examination. He wants to go back here for twenty years.

Mr. Andersen: I have no desire to go back twenty years. I am trying to ascertain what was in the minds of the parties at the time. Many times people talk without saying a word, if people understand them. I am trying to ascertain the state of mind of the witness, that is all. When they came in there, for instance, he did not ask their names. He knew Mr. Wheat and Mr. McCammon. He didn't ask their names—he knew as soon as they said something, he got a quick grasp of the situation. Mr. Schmidt is an intelligent man.

The Court: Anything previous would not be within the [552] scope of the cross-examination.

(Testimony of George B. Schmidt.)

Q. On this occasion, how long did they discuss this matter with you?

A. Probably ten or fifteen minutes.

Q. Was it limited to procuring the work that went over the rail?

A. They objected to that particular loading, and stated they felt they should have had that and any future loading of that nature.

Q. They felt they should have the loading of any water-borne commerce, is that correct?

A. They were specific about barges.

Q. And they were specific about barges?

A. Yes.

Q. They were already doing, shall we say, commercial work, is that correct?

A. They were doing all the loading of steamships and small boats where the possession of the boat was in the name—like, for instance, the Juneau Spruce Corporation owned a boat. They didn't do that—but for outsiders where the fellows asked, we had a chance to pass that expense on to the other man, and if they asked for longshoremen we gave them to them.

Q. If you got out of the expense you didn't mind a bit? A. Right. [553]

Q. And it was billed to other people?

A. Yes.

Q. Boiling this down, they came in and talked to you and said they thought they had a right to the work of loading cargo over the rail, is that right? Is it? A. That is right.

(Testimony of George B. Schmidt.)

Q. You told them in the discussion that you would make no answer at that time, but you would discuss it with your superiors?

A. That is right.

Q. Did you thereafter discuss it with any representatives of Local 16 again?

A. No, I did not. I passed that on to Mr. Hawkins and Mr. Card.

Q. That is the last time?

A. The last I had to do with it.

Q. You discussed this general problem on only these two occasions? A. That is right.

Q. You mentioned on direct examination, as I recall it, you hired longshoremen there up until October? A. Right.

Q. That is from the time the Juneau Spruce, the new corporation, was formed—you hired longshoremen up until October—is that correct? [554]

A. That is correct.

Q. And could you tell us, or putting it this way, the longshore expense there wasn't a very great expense there, was it? A. No.

Mr. Andersen: That is all. Thank you.

Mr. Banfield: Thank you, Mr. Schmidt.

(Witness excused.)

THEODORE NORTON YOUNGS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Strayer:

Q. Will you give us your name?

A. Theodore Norton Youngs.

Q. Y-o-u-n-g-s? A. Yes.

Q. Where do you live?

A. Prince Rupert, B. C.

Q. How long have you lived there?

A. Since 1939.

Q. What is your occupation?

A. Building Supervisor for the Dominion Government and business agent for two lumber companies.

Q. Mr. Youngs, do you have any connection, business relation, [555] with the Juneau Spruce Corporation?

A. I represented the Juneau Spruce Corporation in transfering lumber from barges to railroad cars.

Q. How long have you done so?

A. From early last year, early last summer.

Q. Early in 1948? A. Early in 1948.

Q. What are your duties in that respect?

A. To arrange with the stevedoring company for transfering lumber from the barge to the railroad company.

Q. Is there only one stevedoring company?

(Testimony of Theodore Norton Youngs.)

A. Only one of that type.

Q. What is its name?

A. It is the Pacific Stevedoring Company.

Q. Do the men who do the actual unloading belong to a union?

A. The longshoremen of the I.L.W.U.

Q. Do you know the number of the local over there? A. 505.

Q. Are you acquainted with the officers of that local union?

A. I know the President and Secretary.

Mr. Andersen: Could I interrupt? I make the same objection to the testimony of Mr. Schmidt as I previously made to the other witnesses', in so far as the International is concerned. I assume the Court will again take it under submission. [556]

The Court: You mean your extra Territorial objection?

Mr. Andersen: I mean as to Mr. Schmidt and this gentleman—the same extra Territorial objection.

The Court: Both objections are overruled.

Mr. Andersen: That is, the one will be taken under submission?

The Court: The ruling will be the same as far as Mr. Schmidt's testimony is concerned, and overruled so far as the objection to this witness's testimony is concerned.

Q. What is the name of the President and Secretary of Local 505, I.L.W.U. at Prince Rupert?

A. The President is William Rothwell. The Secretary is W. A. Pilfold.

(Testimony of Theodore Norton Youngs.)

Q. Mr. Youngs, was there an occasion about August, 1948, when a barge load of lumber of the Juneau Spruce Corporation arrived at Prince Rupert?

A. There was, on August 30, 1948.

Q. There was on August 30, 1948. Did you have any duties in connection with that arrival?

A. Yes. I was supposed to transfer it, have it unloaded and load it on railroad cars for the shipment to the States.

Q. Tell what you did in pursuance to that to get the barges unloaded.

Mr. Andersen: I object to that as incompetent and [557] irrelevant.

The Court: Objection overruled.

A. I contacted the Manager of stevedoring company, Mr. Ritchie. I requested and asked to have it arranged to have it transferred—unload and transferred.

Q. What was the reply?

Mr. Andersen: To which I will object as hearsay, may it please the Court.

The Court: Objection overruled.

A. He advised me he couldn't arrange to have it unloaded.

Q. Did he advise you why?

Mr. Andersen: The same objection may it please the Court—hearsay.

The Court: Isn't that a defendant, I.L.W.U.?

Mr. Strayer: No, this is a stevedoring company.

(Testimony of Theodore Norton Youngs.)

Mr. Andersen: He is talking about a stevedoring company.

Mr. Strayer: I expect to follow this up, your Honor. This is merely preliminary.

The Court: I think what should be stated is what was done, rather than what was said, by the witness and officers of the company.

Mr. Strayer: I will withdraw the question.

Q. You made a request to unload it? Was it unloaded? A. It was not. [558]

Q. Did you make any other request of Mr. Ritchie?

A. I wrote to Mr. Ritchie as Manager of the stevedoring company asking him to have the lumber unloaded.

Mr. Andersen: I move that be stricken as self-serving and incompetent.

Mr. Strayer: It will be connected directly with members of the I.L.W.U.

The Court: What is the question?

Court Reporter: "Did you make any other request of Mr. Ritchie?" A. "I wrote to Mr. Ritchie as Manager of the stevedoring company asking him to have the lumber unloaded."

Mr. Andersen: I move that be stricken on the best evidence objection.

The Court: Objection overruled.

Q. Have you finished your answer?

A. I asked Mr. Ritchie to give me a reply in writing, which he did.

Q Did you get a reply in writing?

(Testimony of Theodore Norton Youngs.)

A I got a reply in writing from Mr. Ritchie.

Q. You talked with Mr. Ritchie personally about the reply?

A. Yes. I asked Mr. Ritchie was it definite he couldn't handle it.

Mr. Andersen: I object to that as self-serving, incompetent and immaterial. [559]

The Court: It is hearsay.

Clerk of Court: The letter dated August 31, 1948, has been marked Plaintiff's Exhibit for identification No. 11.

Mr. Andersen: The letter of what, please?

Clerk of Court: The letter of August 31, 1948. The letter addressed to Mr. D. Ritchie, Manager, Pacific Stevedoring and Contracting Company, has been marked Plaintiff's Exhibit No. 12 for identification.

Q. Mr. Youngs, I hand you Plaintiff's Exhibit No. 11 for identification, and ask you if that is the reply you got from Mr. Ritchie in response to your request. A. That is.

Q. I will hand you the document marked Plaintiff's Exhibit 12 for identification and ask you if you saw the original of that letter?

A. I did. I saw the original and asked Mr. Ritchie for a copy.

Q. Is this a copy of the letter which Mr. Ritchie furnished you? A. It is.

Q. Was that original of Plaintiff's Exhibit 12 on a letterhead? A. It was.

Q. And what was the letterhead?

(Testimony of Theodore Norton Youngs.)

A. Local 505, I.L.W.U. [560]

Mr. Andersen: I am going to object to that as hearsay, may it please the Court—incompetent, irrelevant and immaterial.

The Court: It hasn't been offered yet.

Q. Was the original of that letter, Plaintiff's Exhibit 12—you saw it in Mr. Ritchie's office?

A. I did.

Q. What was the signature?

A. The signature was W. Rothwell, the President, and W. A. Pilfold, Secretary of the Local.

Q. W. Rothwell is President of Local 505 and W. A. Pilfold is Secretary of that Union?

A. That is right.

Q. And Mr. Ritchie furnished you a copy of Exhibit 12 as a true copy? A. Right.

Mr. Strayer: I offer these letters in evidence. Do you mind if I ask another question?

Mr. Andersen: Go ahead.

Q. I should ask you where is the original of that letter of which Plaintiff's Exhibit 12 for identification is a copy?

A. I presume it would be in the file of Mr. Ritchie, the Manager of the stevedoring company.

Q. And he is in Prince Rupert? [561]

A. In Prince Rupert.

The Court: Do you object?

Mr. Andersen: Yes. In addition to my extra Territorial objection, to which the Court referred, we object that there is no sufficient foundation laid under the best evidence rule and that it is in-

(Testimony of Theodore Norton Youngs.)

competent, irrelevant and immaterial and hearsay, your Honor.

The Court: What do you claim, so far as the admissibility of the letter marked Exhibit No. 11 is concerned?

Mr. Strayer: That Exhibit 11 is admissible for the purpose of showing the general response the Juneau Spruce Corporation got to its attempts.

The Court: I overlooked the fact that this was addressed to the plaintiff. May I see them again? I think I got them twisted.

Mr. Strayer: The rule of law is that wherever conduct of any person becomes material and here stevedores' was material.

The Court: I overlooked the fact that it was addressed to the plaintiff. Will you let me see it again? The objection is overruled. They may be admitted.

Clerk of Court: They have been marked Plaintiff's Exhibits 11 and 12 in the same order as they were marked for identification.

Mr. Andersen: I believe I have the objection of [562] self-serving to Exhibit 11, your Honor.

The Court: Neither of these is from the plaintiff so it is difficult to see how either one could be self-serving. They don't purport to be made by plaintiff or its officers.

Mr. Andersen: Neither one purports to be, but the evidence may be self-serving, whether a letter is written by or to the plaintiff it may still be self-serving. Of course, both are hearsay.

(Testimony of Theodore Norton Youngs.)

The Court: The only "self" the law is concerned with, as I understand it, is one of the parties themselves.

Mr. Andersen: The Court of course understands the matter of the best evidence objection to Exhibit 12?

The Court: It has been shown that it is out of the jurisdiction of the Court.

Mr. Strayer: Plaintiff's Exhibit 11 is headed "Pacific Stevedoring and Contracting Company, Ltd., Prince Rupert, B. C., August 31, 1948. Juneau Spruce Mill, Mr. T. Norton Youngs, agent, Prince Rupert, B. C. Dear Sir: We thank you for your letter of today's date, in which you asked us to unload a scow load of lumber now docked at the Ocean Dock. We have advised our longshoremen's Union of the labor condition under which this scow was loaded at Juneau. Our longshoremen's union wired the International Longshoremen's & Warehousemen's Union Head Office, Vancouver, B. C., [563] of this current labor situation at Juneau. Our Local Union has been told by their Head office of Vancouver to refrain from unloading until the trouble between the Longshoremen's Union at Juneau and the Mill at Juneau has been settled. We deeply regret our inability to unload this lumber under these conditions. However, if and when your labor troubles are settled, we will be only too pleased to handle any shipments you may wish to ship through the Port of Prince Rupert. Yours truly, Pacific Stevedoring and Con-

(Testimony of Theodore Norton Youngs.)

tracting Company, Ltd., per A. D. Ritchie, Manager." Plaintiff's Exhibit 12 is headed "I.L.W.U. Local 505-CIO, P.O. Box 531, Prince Rupert, B. C., Mr. D. Ritchie, Manager Pacific Stevedoring and Contracting Co., Prince Rupert, B. C. Sir: This is to advise you that the membership of the above Association will not become involved in the labor trouble in connection with the recently arrived scowload of lumber from Juneau, Alaska. On advice from our headquarters in Vancouver, the matter is between the Juneau Spruce Corporation and the longshoremen of Juneau, Alaska, also with the International Woodworkers of America. Yours truly, President W. Rothwell, Secretary, W. A. Pilfold."

Q. Mr. Youngs, upon receipt of this information, I will ask you whether you communicated that information to the Juneau Spruce Corporation? A. I did. [564]

Q. Now, thereafter did you have occasion to talk with anyone—strike that. Was the barge unloaded there at Prince Rupert? A. It was not.

Q. Do you know where it went from there?

A. On instructions to me, I advised the Captain to take it to Tacoma.

Q. Was it still loaded when it left Prince Rupert? A. It was.

Q. Was there any time thereafter, after August 31, 1948, that you talked with anyone in regard to the possibility of unloading barges of lumber at Prince Rupert?

(Testimony of Theodore Norton Youngs.)

A. Yes, on September 30, 1948.

Q. And did you receive a call from anyone on that date?

A. I received a telephone call from the Secretary of the Prince Rupert Chamber of Commerce, and he asked me to attend the meeting.

Q. Where? A. At the Secretary's office.

Q. Who was at the meeting?

A. The Secretary introduced me to Mr. Boochever of Juneau. Mr. A. D. Ritchie, the Manager of the Pacific Stevedoring Company was there, and he introduced me to Mr. John Berry, International representative of the I.L.W.U.

Q. Do you know who Mr. Boochever was? [565]

A. Mr. Boochever was introduced as an attorney from Juneau representing the Juneau Spruce Corporation.

Q. Did they tell you what the meeting was about?

A. Mr. Boochever asked Mr. Berry if Local 505 in Prince Rupert could handle shipments from the Juneau Spruce Corporation.

Mr. Andersen: I am going to object to all of this, may it please the Court. In so far as the International is concerned there is no foundation at all, may it please the Court, and it is hearsay so far as these defendants are concerned.

The Court: Objection overruled.

A. Mr. Berry replied that they could not handle it while the present labor trouble was on in Juneau and stated that he had—it was on his in-

(Testimony of Theodore Norton Youngs.)

structions that the Local was not handling it. Mr. Boochever asked him why and why he had thus instructed the Local, and Mr. Berry stated that his information was to the effect that the Juneau longshoremen weren't getting work they were supposed to have and were losing one-third of their income. Mr. Boochever then asked him where he got that information, and he said that he got it from his San Francisco headquarters. He said that the Local would not be able to unload lumber from the Juneau Spruce while the trouble was on in Juneau.

Q. Was that all the conversation? [566]

A. I believe so.

Q. Do you remember any mention in the conversation of Vern Albright?

Mr. Andersen: Beg pardon?

Q. Was there any mention in the conversation of Vern Albright?

Mr. Andersen: I object to that as leading and suggestive, may it please the Court.

The Court: Objection overruled.

A. Mr. Berry stated that Vern Albright phoned him from Prince Rupert when the barge was there on August 30, and he, Berry, told Mr. Albright he didn't want any picketing in Prince Rupert. Mr. Albright said—Berry said it was Mr. Albright said in a joking manner if any picketing was done he, Albright, would do it himself.

Q. Is that substantially all the discussion at that time? A. It was.

Q. Did you talk with anyone else that day in

(Testimony of Theodore Norton Youngs.)

an effort to find out if lumber could be moved through Prince Rupert?

A. I introduced Mr. Boochever to Mr. Pilfold, the Secretary——

Q. The Secretary of Local 505, I.L.W.U.?

A. Yes.

Q. Where was that conversation held?

A. On the street in Prince Rupert.

Q. Will you tell us what took place at that conversation?

A. I introduced Mr. Boochever as being from the Juneau Spruce [567] and being anxious to see lumber go through Prince Rupert again.

Mr. Andersen: The same objection to this line of questioning, may it please the Court.

The Court: Mr. Pilfold was Secretary of the I.L.W.U.? A. Yes.

The Court: Objection overruled.

A. And Mr. Boochever asked Mr. Pilfold if the Local in Prince Rupert would handle further shipments. Mr. Pilfold said they would not. He said, at the time the barge was there on August 30, Mr. Guy—Joe Guy—had spoken to Mr. Pilfold in Prince Rupert and to the members of the Local, and had told them that the longshoremen in Juneau were not getting work they considered they were entitled to, and told them they had been told by the management of the original Juneau Lumber Company that the same arrangement would continue, as they had before, would continue when

(Testimony of Theodore Norton Youngs.)

the new company took it over, and such hadn't been the case, and they hadn't gotten work they thought they were entitled to. After this conversation Mr. Pilfold said Prince Rupert would not handle lumber from Juneau Spruce while the picket line was on the lumber mill in Juneau.

Q. That conversation about work done for the former company, as I understood it, Pilfold understood that was a statement made by Joe Guy? [568]

A. He did.

Q. Did you talk with anybody else in Prince Rupert that same day?

A. I also introduced Mr. Boochever to William Rothwell, the President of the I.L.W.U. Local.

Q. Will you relate the conversation with Mr. Rothwell?

A. It was along similar lines. Mr. Boochever asked if the Local could handle lumber from Juneau Spruce. Mr. Rothwell said they could not under present conditions while the picket line was on. He said while the barge was in Prince Rupert on August 30 Mr. Albright and Mr. Guy both talked to the Local and had advised them of the picket line here and that they felt they weren't getting a fair treatment in the work and that they had lost approximately one-third of their income through not getting this work.

Q. Was that all the conversation with Mr. Rothwell? A. I believe so.

Q. Was Mr. Rothwell asked regarding his opinion of future unloading of shipments?

(Testimony of Theodore Norton Youngs.)

A. He said they wouldn't unload shipments until they got word from headquarters that the trouble was cleared up.

Q. Did he say what headquarters?

A. Vancouver headquarters.

Q. Mr. Berry's office?

A. He did say Mr. John Berry, their representative, as I [569] understood it.

Q. Did you ever again talk to Mr. John Berry?

A. Over the telephone, yes.

Q. When was that?

A. Last week from Juneau.

Q. Do you recall the date?

A. Last Thursday, whenever that was; the 28, April the 28.

Q. You put in a long distance call to Mr. Berry?

A. I asked central to get me the office of the International Representative of the I.L.W.U. in Vancouver, British Columbia.

Q. And did you get him?

A. Central called me to the phone while they were checking with Vancouver, and I heard the Vancouver operator give them the telephone number which she said was that office's telephone number. I was then connected.

Q. Did you talk to Mr. Berry?

A. I asked if that was the office of the International Representative of the I.L.W.U., and he said it was.

Mr. Andersen: I object to that as hearsay.

(Testimony of Theodore Norton Youngs.)

Mr. Strayer: It is not hearsay.

The Court: Objection overruled.

A. He said it was his office, and I asked who the International [570] Representative was. He said it was Mr. John Berry.

Mr. Andersen: Same objection, may it please the Court.

The Court: Overruled.

A. I asked if Mr. Berry was there. He said he was not there, that he had left for New Westminster, the office of the New Westminster Local, and he gave me the phone number which I had central call, and the New Westminster office answered and said that Mr. Berry, the International Representative, had been there but had left for his home.

Mr. Andersen: I move that be stricken as hearsay, may it please the Court.

The Court: It is all with one of the agents of the defendant. Motion denied.

Q. Go ahead, Mr. Youngs.

A. After about an hour's delay I contacted Mr. Berry's home, the phone number given me by the office in New Westminster. Mr. Berry answered the phone, and I asked him was that Mr. John Berry, the International Representative. He said it was. I asked him if he remembered meeting me in Prince Rupert last September. He said he did. I introduced myself over the phone, and he remembered me. I asked what the status of lumber would

(Testimony of Theodore Norton Youngs.)

be going through Prince Rupert now from Juneau Spruce, and he said he had heard—— [571]

Mr. Andersen: It is understood my same objection goes to all of this your Honor?

The Court: Yes.

A. He said he had heard of the National Labor Relations Board's ruling, but that Vern Albright said it didn't make any difference, that the situation was the same. I asked about his own ruling or his headquarters' ruling on it. He said he would call his head office in San Francisco that night and attempt to find out and contact me here in Juneau next day.

Q. Was that all the conversation?

A. That was all.

Q. Did he call you next day?

A. I had to return to Prince Rupert without hearing from him at all, so in Prince Rupert on Monday this week, May the 2nd, I called the office of the International Representative in Vancouver of the I.L.W.U. Mr. Berry answered the phone, and I asked what he had heard from the San Francisco office and was calling him since I hadn't heard from him. He said he had just then got word from San Francisco from his office.

Mr. Andersen: My same objection runs to all this, I assume, your Honor?

The Court: Yes.

A. He said the situation was still unchanged and Local 505 [572] in Prince Rupert could still not handle the lumber.

(Testimony of Theodore Norton Youngs.)

Q. Was that all the conversation at that time?

A. I believe it was.

Q. When you called the second time, from Prince Rupert, did you look up the telephone number in the——

A. In the Vancouver directory.

Q. How was it listed?

Mr. Andersen: I object to that as hearsay.

The Court: Objection overruled.

A. Regional Office of the I.L.W.U. in Vancouver.

Q. Is it I.L.W.U. or is it spelled out?

A. Spelled out.

Q. How?

A. International Longshoremen's & Warehousemen's Union.

Mr. Strayer: The plaintiff offers to show that a copy of the Vancouver telephone directory is not available in Juneau, in case counsel wants to object as not being the best evidence. You may cross-examine.

Cross-Examination

By Mr. Andersen:

Q. All these places you have mentioned except Juneau are in Canada, aren't they?

A. They are.

Q. When did you first meet Mr. Boochever?

A. September 30, 1948.

Q. Is that the first time you met him?

A. It was.

(Testimony of Theodore Norton Youngs.)

Q. Do you know if he came particularly to see you?

A. I don't believe so; no. I understand he came down to see if he could get the lumber moving through Prince Rupert.

Q. Where did you meet him?

A. I was invited in the Secretary of the Chamber of Commerce's office to meet him.

Q. Did you spend one day or more than one day with him?

A. Just part of one day, I believe.

Q. You introduced him to how many people?

A. I believe I probably introduced him to four or five.

Q. You have mentioned about three here you introduced him to. Who else did you introduce him to?

A. I introduced him to a lawyer, Mr. Harvey.

Q. Who is Mr. Harvey?

A. An attorney in Prince Rupert.

Q. Who does he represent, if you know—anybody concerned in this case?

A. Not that I know of.

Q. To whom else did you introduce him?

A. I couldn't say for sure. I do know I met a couple friends of mine; Mr. Boochever being with me, I introduced him. [574]

Q. You introduced him to Mr. Berry?

A. No. I didn't know Mr. Berry before the meeting.

(Testimony of Theodore Norton Youngs.)

Q. Did you introduce him to the Secretary and President of this Local? A. I did.

Q. And to anybody else you think was connected with the Union? A. No.

Q. When you introduced him to Mr. Rothwell, what did you say?

A. I introduced him as Mr. Boochever, an attorney from Juneau representing the Juneau Spruce Corporation.

Q. And the same with respect to the other gentlemen of the Local there? A. Yes.

Q. And how long did they talk, if you know?

A. I imagine five or ten minutes.

Q. Was all this at this Chamber of Commerce luncheon?

A. It wasn't a luncheon; it was a previous meeting and was in the man's office.

Q. Whose office?

A. The Secretary of the Chamber of Commerce.

Q. Is that where you introduced Mr. Boochever to Mr. Rothwell and to the other gentlemen, the Secretary of the Union?

A. No; on the street in Prince Rupert. [575]

Q. They happened to be walking along the street?

A. In the case of Mr. Pilfold, yes. In the case of Mr. Rothwell, we had gone to the dock to see Mr. Rothwell.

Q. You took Mr. Boochever there yourself?

A. Yes.

(Testimony of Theodore Norton Youngs.)

Q. Did you make it a point to take him down there?

A. He wanted to meet Mr. Rothwell; yes.

Q. When he met Mr. Rothwell, are you certain you told him he was an attorney from Juneau?

A. Definitely.

Q. Do you know if Mr. Boochever gave him a card?

A. I don't believe so. I am not sure of that.

Q. Did Mr. Boochever participate in the conversation?

A. The conversation was between Mr. Boochever and these gentlemen; not myself.

Q. And you just stayed there? A. I did.

Q. At that time did you have the letters which have been introduced in evidence?

A. Yes; I had them in my file.

Q. You didn't have them with you, I mean?

A. No.

Q. Then, in the presence of Mr. Boochever, you didn't show them to any men from the Union?

A. No. [576]

Q. As I understand the substance of this conversation, that you heard, rather between Mr. Boochever and the two officials, as you say, of the Local there in Prince Rupert, was that there was a strike up here in Juneau, and the longshoremen there at Prince Rupert wouldn't handle the lumber on that scow; is that the gist of it?

A. Yes.

Q. Did I also understand you to say somebody

(Testimony of Theodore Norton Youngs.)

told you a Mr. Guy had come down and talked to the longshoremen and said in effect that the longshoremen up here were being cheated by the Juneau Spruce Company out of work they had always had and they had a picket line in front of the place?

A. These gentlemen told Mr. Boochever that in my presence.

Q. On either one or two occasions they told Mr. Boochever in your presence that in effect they were locked out by the Juneau Spruce Company because they were being cheated out of work they had always had from the Juneau Spruce Company as well as its predecessor the Juneau Lumber Company; is that correct?

Mr. Strayer: I object. That is not a correct statement of what the witness' testimony was, your Honor.

Mr. Andersen: Counsel knows this is cross-examination.

Mr. Strayer: I realize that very well, but it doesn't justify counsel in misquoting the testimony, your Honor. [577]

Mr. Andersen: I am not misquoting.

The Court: It might be that he misquoted it, but perhaps unintentionally. The witness undoubtedly can take care of himself. Objection overruled.

Q. Do you want me to repeat the question?

A. One part I don't remember saying is that they had the work from the Juneau Spruce. As I remember, they had the work from the Juneau Lumber Company, I believe.

(Testimony of Theodore Norton Youngs.)

Q. He was quoted as having said they always had the work from the Juneau Lumber Company and the Juneau Spruce was trying to cheat them out of it; is that part of it?

A. I don't know that I said "trying to cheat them out." They said it was work they were entitled to.

Q. I thought you used the word "cheat."

A. I may have.

Q. I may have been mistaken. Let's start again. One of these men down there told Mr. Boochever in your presence that Mr. Guy talked to some of the longshoremen and told them they had always done this longshore work for the Juneau Lumber Company; is that correct? A. Yes.

Q. And that they claimed the work was their work; is that correct? A. Yes.

Q. And that they felt the Juneau Spruce Company was cheating [578] them out of work they should have?

A. In effect cheating them—or depriving; I don't know what word—of the work.

Q. Cheating or depriving—I happened to write the word "cheating" down. That completed your statement, didn't it? A. I believe so.

Q. In other words, that was what was substantially said on the two occasions where Guy was quoted; is that correct? Or was Guy only quoted—— A. Both of them quoted Guy.

Q. Both of them quoted Guy. On both occasions

(Testimony of Theodore Norton Youngs.)

what I have just said was substantially what Guy was having been quoted as saying——

A. Substantially so.

Q. In Prince Rupert?

A. In Prince Rupert; yes.

Mr. Andersen: I think that is all.

Mr. Strayer: That is all, Mr. Youngs.

(Witness excused.)

Mr. Banfield: If the Court please, this is an out of town witness that we would like to call out of order at this time for the purpose of showing prices

Mr. Banfield: No; what it would have been sold had been produced in 1948, and the witness is out of turn, of course, because we haven't laid a proper foundation here for the production of these amounts of lumber in these cases, but it is purely for the convenience of the witness.

The Court: You mean the market price rather than what it was sold at?

Mr. Banfield: No; what it would have been sold at if it was produced and not the market price will be discussed here by a man under contract to buy them.

The Court: Is that a copy of an exhibit marked for identification?

Mr. Banfield: No, your Honor. This is entirely new.

The Court: You may proceed.

Mr. Banfield: I would like to mark this.

MELVIN W. PRAWITZ

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. I would like the witness to state his name.

A. Melvin W. Prawitz.

Q. Where do you reside?

A. Portland, Oregon.

Mr. Banfield: I would like to have this marked for identification.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 13 for identification.

Q. Mr. Prawitz, what is your occupation? [580]

A. Lumber salesman and buyer.

Q. And for whom do you work?

A. Dant & Russell, Incorporated.

Q. And where is the main office of Dant & Russell, Incorporated?

A. 711 Equitable Building, Portland, Oregon.

Q. Is that the office in which you work?

A. Yes.

Q. Mr. Prawitz, we wish to identify Dant & Russell here for reasons which will be obvious in a short time. Will you tell us what kind of an organization it is, and what it does, and how extensive its operations are?

Mr. Andersen: Did you say "expensive" or "extensive"?

Mr. Banfield: "Extensive."

(Testimony of Melvin W. Prawitz.)

A. It is a lumber brokerage firm also acting as sales agent for several mills. They also handle firtex, doors and plywood.

Q. And in what area do you buy lumber?

A. We buy lumber from northern California, Oregon, Washington and Alaska.

Q. And do you—where do you sell this lumber?

A. Anywhere in the United States, also for export.

Q. Where do you maintain offices—for the distribution of this lumber—do you have any branch offices?

A. Yes, there are sales agencies in San Francisco, Los [581] Angeles; Columbus, Ohio; Newark, New Jersey; Philadelphia, Pennsylvania; Boston, Massachusetts; Rensselaer, New York, and Albany, New York, also——

Q. Permit me to stop you there, Mr. Prawitz. Are those sales agencies of Dant & Russell, Incorporated, directly under their control or management?

A. Yes, they are under their control.

Q. Do you have any other method of disposing of lumber except through these particular sales agencies and offices?

A. Yes; we have commission salesmen. Some are exclusive for Dant & Russell and others are used by other mills and brokerage firms.

Q. Where do you find those, generally speaking?

A. They would be throughout the United States.

(Testimony of Melvin W. Prawitz.)

Well, they might possibly miss a few states, but we have them pretty well represented throughout the United States.

Q. Do you have any connection in foreign countries? A. Yes.

Q. What do you have abroad?

A. They are also actually commission agents. We have them in London, also we work with some in Europe, Australia and the Hawaiian Islands.

Q. How much lumber does Dant & Russell dispose of in any period of time which you can name?

A. I would say the average rail shipments are approximately [582] one hundred, or I mean one thousand cars per month, and then there is also Atlantic Coast water shipments and export shipments—that would total approximately the same as the rail shipments that would be.

Q. Is there any agreement between Juneau Spruce Corporation and Dant & Russell, Incorporated?

A. A verbal agreement that we act as their sales agent.

Q. Is that customary for you to act on a verbal agreement? A. Yes.

Q. And would you tell us how this agreement operates?

A. We have been handling their sales——

Mr. Andersen: I didn't hear that.

A. We have been, and do, handle their sales outside of Alaska; in other words, anything going to the States or anywhere we see fit to sell it.

(Testimony of Melvin W. Prawitz.)

Q. Are you the exclusive agent for outside sales?

A. Yes.

Q. Pardon me for interrupting—how does it operate? Just go ahead, explain the methods, what you do in buying and selling this lumber.

A. Actually, we operate in one of two ways. We offer stocks for sale the same as for other people. When we receive an order it is subject to our confirmation and we give the mill a chance to confirm the order, and then it becomes a formal order, and then we act or sell on a [583] commission basis.

Q. That is one method? A. Yes.

Q. Do I understand you to say that you wait for some agency of Dant & Russell, Incorporated, or some commission agent to get an order from some customer—we will say in Albany—and he transmits the order to your office, and you transmit it to where, to do business with the Juneau Spruce? Where do you have to send that order? Do you do it in Portland or Coos Bay or where?

A. We write an order in Portland and send it to Juneau.

Q. And that shows the prices? A. Yes.

Q. And quantity? A. Yes.

Q. Grades? A. Yes.

Q. When an order gets to Juneau what is done?

A. They ship on that order.

Q. Do they ship before they agree with you to sell the lumber?

(Testimony of Melvin W. Prawitz.)

A. Not on that particular car. We have——

Q. I mean on this particular type of a sales deal now.

A. No; they wouldn't ship until they received the order.

Q. Would they confirm the order before shipping? In other [584] words, do they have an opportunity to refuse that offer? A. Yes.

Q. Then their acceptance or rejection is transmitted to you, is that right? A. Right.

Q. And you have to go on back to the customer?

A. Yes; or place it elsewhere.

Q. What other type of arrangement do you have with Juneau Spruce, if any?

A. We, in some cases, we have waited for an inventory and sold the stock in transit.

Q. Mr. Prawitz, your terms in the trade are not quiet intelligible to us, such as you say "wait for inventory." We don't know what that means.

A. If they have accumulated stock and do not have orders for that stock and decide they want to ship it, we tell them to go ahead and ship and they send a tally, or list of grades and footages, and we sell from that list while the stock is in transit to the States, or wherever it might be going.

Q. In that event, if the sale is on the second plan, do you always tell them at what prices you can sell before you can sell?

A. Yes; we give them a chance to turn down the offer or order the same as on any other business. [585]

(Testimony of Melvin W. Prawitz.)

Q. If the Juneau Spruce Corporation were to have offered Dant & Russell for sale during the year 1948 fifty million feet of lumber of the kind which is produced in Southeastern Alaska and in the grades which are produced here, would you have been able to dispose of that lumber?

A. Yes.

Mr. Andersen: To which I will object and move it be striken, a sufficient foundation not having been laid.

Mr. Banfield: We shall ask the witness how he knows.

The Court: You can ask him as to the state of the market from which that could be inferred. The objection is overruled in the meantime.

Q. Did you answer the question? A. Yes.

Q. What was your answer?

A. Yes; it was yes.

Q. Would fifty million feet of lumber be a very large percentage in your total business?

A. No. It would be approximately—oh, I should say, eight or ten per cent.

Q. Now, what was the state of the lumber market in 1948, as compared to, we will say, 1947?

A. The lumber market in 1948 prior to, I think, September—some of the grades started falling off a little—but the market prior to that time was at its peak. In comparison [586] with 1947, I would say after July, 1947, until September or October, 1948, was a peak market. In other words, the stock——

(Testimony of Melvin W. Prawitz.)

Q. What do you mean, "peak market"? Do you mean demand?

A. Demand and price.

Q. Demand and price? A. Yes.

Q. In other words, how readily would this lumber have moved on the market up to September, 1948?

A. Well, very readily. In other words——

Mr. Andersen: Same objection to all of this, may it please the Court—not sufficient foundation having been shown.

The Court: Objection overruled.

Q. Was it a sellers' market or a buyers' market?

Mr. Andersen: The same objection, may it please the Court.

The Court: Objection overruled.

A. A sellers' market.

Q. By that, what do you mean?

A. In other words, we as lumber salesmen, were able to get our price for the material and it wasn't too hard to find the people interested in buying the lumber.

Q. What happened in the market after September of 1948?

A. Well, the lower grades of lumber in September showed a [587] slight decline. In October it showed a much greater decline.

Q. Let me stop you there. How about in the medium and higher grades of lumber?

A. Not so much—I think possibly November was the larger—so in the upper grades, and then it more or less leveled off from that time on.

(Testimony of Melvin W. Prawitz.)

Q. And continued at that level until what time?

A. It is still about the same.

Q. Mr. Prawitz, how long have you been with Dant & Russell?

A. July 28, 1946, is when I started with them.

Q. And have you been in this same position all the time?

A. No; I don't know just how you mean that.

Q. Since you began with Dant & Russell, do you occupy the same position?

A. No. I was buying and selling, but different types.

Q. What types have you bought and sold?

A. I started in what we call small mill production, which was rough lumber, and then yard items, and then specialties, such as spruce, cedar, hemlock, etc.

Q. In other words, you are now buying and selling specialties, is that it? A. Yes.

Q. Did that include the particular type of lumber produced in Southeastern Alaska? [588]

A. Yes. In other words, the policy set down is that they do handle spruce.

Q. Before you went with Dant & Russell, Incorporated, would you tell us briefly your experience in the lumber industry?

A. How far back.

Q. Say, when you quit school and briefly outline it—I don't want to take very long.

A. I actually started in lumber in about 1932,

(Testimony of Melvin W. Prawitz.)

in Anacortes, Washington. I worked in mills, and then about 1940 I went to work for McDonald & Gattie Company, who were spruce lumber brokers, and I inspected for them, and did some buying, and later on I ran a remanufacturing plant for them, after which I worked for probably—I think it was 1943 I went to work for the Spruce Lumber & Veneer Company at Vancouver, also a spruce operation, and this was mainly in spruce, aircraft and clears, and the aircraft program faded, after which I went to work for the Pacific Lumber Inspection Bureau, from then—that was probably, I think it was 1945 and '46, until I went to work for Dant & Russell.

Q. Mr. Prawitz, what is the Pacific Lumber Inspection Bureau, which will come into the case later?

A. Well, it is an independent inspection service, in other words. I don't know just how to explain it. They are [589] the official graders for mainly export lumber, although they do also grade for domestic shipments.

Q. The mill operator will hire a P.L.I.B. man to certify his lumber as to grade?

A. That is right.

Q. Does that certificate mean anything in the trade? A. Yes.

Q. What does it mean?

A. The grading is final and you could call for re-inspection.

(Testimony of Melvin W. Prawitz.)

Q. By whom? A. A supervisor.

Q. Of whom? A. P.L.I.B.

Q. Are there inspections?

A. Once in a while there might be a question.

Q. By supervisors in the same organization?

A. The same organization or West Coast Bureau of Grades.

Q. Mr. Prawitz, are you familiar with the prices at which the various types, grades, sizes, qualities of lumber produced in Southeastern Alaska could have been sold? Do you know what the market prices were for lumber during each month?

Mr. Andersen: That assumes facts not in evidence. No foundation has been laid.

Mr. Banfield: I am asking if he knows. [590]

Mr. Andersen: That is getting into that objection again, if somebody is asking and somebody would answer "I know how," or I mean say "Yes," I don't know where he would get the information. It is the same idea.

The Court: It might be a guess in the case you cite, but it appears here that it would be a little more than a guess.

Q. Now, would you, Mr. Prawitz, know the prices at which the various grades, etc., could be sold? A. Yes.

Q. That is in response to my full question that I asked a moment ago? A. Yes.

Q. Did you prepare this schedule marked Plaintiff's Exhibit No. 13 for identification which I now show you? A. Yes.

(Testimony of Melvin W. Prawitz.)

Q. And where did you prepare that?

A. In the Portland office.

Q. Of Dant & Russell, Incorporated?

A. Yes.

Q. And you had access to all your records at that time? A. Yes.

Q. You have access to all records of Dant & Russell, Incorporated? A. Yes. [591]

Q. And this is prepared from your own knowledge and transactions that took place?

A. Yes.

Q. Now, Mr. Prawitz, if fifty million feet of lumber had been offered to you in 1948 and 1949, that is, from April, 1948, to the end of March, 1949, could you have disposed of it and sold it for the prices stated for the various grades, qualities, sizes and in the months set forth in this schedule as shown on this Exhibit 13 for identification?

Mr. Andersen: I object. It is purely speculative and an insufficient foundation has been laid, and it is incompetent, irrelevant and immaterial, may it please the Court.

The Court: You might ask him as to what he sold during that period, during that year—whether he sold that kind of lumber.

Q. Mr. Prawitz, did you sell the kind of lumber shown on this exhibit during 1948? A. Yes.

Q. Did you sell any quantity?

A. We didn't sell the quantity, we sold it in other species. The quantity of spruce wasn't available, due to the market being a sellers' market.

(Testimony of Melvin W. Prawitz.)

Q. In other words, you mean to say you didn't have enough of it to sell? [592]

A. That is right.

Q. But you did sell some? A. Yes.

Q. Spruce? A. Yes.

Q. Hemlock? A. Yes.

Q. Cedar? A. Yes.

Q. Do you know what the prices and the demand —do you know what the demand was and what the price was that the public would pay for these goods?

A. Yes.

Q. During all these months? A. Yes.

Q. And for all these grades, and sizes?

A. Yes, that is right.

Q. Do you know of your own knowledge whether you could have sold fifty million feet of lumber from Southeastern Alaska? A. Yes.

Q. Grown and produced here, at the prices shown on this sheet? A. Yes.

Mr. Andersen: The same objection, may it please the Court. [593]

The Court: The same ruling.

Q. Could you have, or could you not?

A. We could.

Mr. Andersen: The same objection.

The Court: The same ruling.

Mr. Banfield: So I will make sure of the last question, I will put it in a different form.

The Court: I thought you followed it up. That objection was overruled after that.

(Testimony of Melvin W. Prawitz.)

Mr. Banfield: Will you read the last question and the last answer please?

Court Reporter: "Could you have, or could you not?" A. "We could."

Q. Now, Mr. Prawitz, how definite are these prices, how certain are you that you could have sold these quantities at these prices?

Mr. Andersen: I object to that as calling for the conclusion and opinion of the witness and a sufficient foundation not having been laid.

The Court: It might be if it was future, but not for past. Objection overruled.

A. Those prices are conservative. We are certain we could have sold the lumber at those prices shown on that schedule.

Mr. Banfield: That is all. You may cross-examine. [594]

Cross-Examination

By Mr. Andersen:

Q. Mr. Prawitz, are you being paid for your testimony here? A. Being paid?

Q. You heard the question, didn't you? Didn't you hear my question? A. Yes, sir.

Q. I asked you if you were being paid for your testimony here. Can't you answer that simply and shortly? Do you have to hesitate to answer the question?

Mr. Strayer: If the Court please——

Q. Don't look at counsel. Look at me.

Mr. Strayer: I object to counsel's tactics.

(Testimony of Melvin W. Prawitz.)

Mr. Andersen: I want the record to show I asked a simple little question.

The Court: You asked if he is being paid for his testimony. That is rather ambiguous. The fact that the witness hesitated would hardly justify any intemperate attitude toward him. You may answer the question.

A. I don't understand the question.

Q. Have you received any money for coming here? A. No.

Q. Have you received any money for compiling this data?

A. My regular salary—it is part of my work. It would be Dant & Russell income. [595]

Q. Have you come up here to testify without a fee of any kind? A. Without what?

Q. Without a fee of any kind?

A. My normal salary.

Q. Do you have any understanding with the Juneau Spruce Corporation that you will be compensated for your work here?

A. No, I haven't.

Q. Do you know if anybody else made arrangements to have you compensated for coming up here?

A. How that will be handled, I don't know.

Q. When I asked you first if you were being paid for coming up here, you said "What," didn't you? A. I didn't understand your question.

Q. Is that the only thing you meant? Don't you understand what payment is? A. Certainly.

(Testimony of Melvin W. Prawitz.)

Q. If a person asks you a question, "Have you been paid for something?" don't you understand what is meant by that? Don't you understand what is meant by that question?

A. That takes in a lot of territory.

Q. Don't you understand what is meant by that question, "Have you been paid for that?"—can't you understand that, sir?

A. Not the way it was put. [596]

Q. You didn't understand the way it was put when I asked the question, "Have you been paid for testifying?"—you don't understand that?

A. I do now.

Q. I had to explain all this before you understood what was meant by a simple question, "Have you been paid for testifying?"

A. That is right.

Q. And you say you drew this compilation; and you don't understand a simple question, and you drew this compilation? A. I drew that.

Q. Did you bring any records of any kind?

A. No, sir.

Q. Did you know that you were going to testify here today? A. That is right.

Q. Did you talk this testimony over with anyone before you came here? A. Well, I——

Q. Can't you answer yes or no? A. Yes.

Q. Did you talk this testimony over with anyone before today? A. Yes.

Q. With whom? A. Fellow workers.

(Testimony of Melvin W. Prawitz.)

Q. That is, of course, just fellow workers?

A. And I have naturally talked about the case since I have been here.

Q. You have to hesitate to answer those simple questions?

Mr. Strayer: Your Honor, I would like the record to show and counsel knows that attorneys generally talk to their witnesses before they testify, and I object to counsel's bullying tactics.

Mr. Andersen: I am not bullying.

Mr. Strayer: He doesn't give him time to answer and then jumps on him for not answering in a hurry.

The Court: I think the manner of questioning is hardly justified in view of the nature of the testimony asked for. It is not as if we were on a vital issue.

Mr. Andersen: You are probably right, your Honor.

Q. Have you discussed this case with anybody else? A. Yes.

Q. With whom? A. Fellow workers.

Q. Fellow workers? A. Yes.

Q. What do you mean by fellow workers?

A. The men I work with at Dant & Russell.

Q. Of course you haven't discussed it with these gentlemen here, have you? [598]

A. Yes, I have.

Q. Oh, you have also discussed it with them. You haven't brought any records with you, have you? A. No.

(Testimony of Melvin W. Prawitz.)

Q. Can you tell me how many feet of lumber that you sold, if any, for the Juneau Spruce Lumber Company from May 1, 1947, to April 30, 1948?

A. No. I don't know exactly.

Q. Do you know if you sold any?

A. Yes, sir.

Q. But you don't know exactly?

A. I don't know the exact footage; no.

Q. Did you check it?

A. We keep a record of it.

Q. Did you check it before you came up here to testify? A. No.

Q. As to how much was actually sold by you?

A. No, I didn't.

Mr. Andersen: That is all. Thank you.

Mr. Banfield: That is all, Mr. Prawitz. Thank you very much.

(Witness excused.)

(Whereupon the jury was duly admonished and the trial was adjourned until ten o'clock a.m. May 6, 1949, reconvening as per adjournment with all parties present as heretofore, and [599] eleven of the twelve jurors present in the box; whereupon the Court directed the Marshal to inquire into the absence of the juror Mrs. Hunsbedt, and thereupon the trial proceeded as follows:)

Mr. Banfield: I think we have a legal matter we can dispose of while we are waiting for the absent juror, in the absence of the jury.

The Court: The jury may retire until called.

(Whereupon the jury retired from the court-room.)

Mr. Banfield: If the Court please, counsel for defendants have indicated they would like to call Mr. Schmidt this morning as a witness for the defendants out of turn, in order to accomodate Mr. Schmidt, who will have to be gone from Juneau from now on. We have consented. In asking to call him out of turn they stated that they intend to show past practice at the Juneau Lumber Mills, and no doubt in the course of the presentation of testimony the question is going to come up as to whether or not that is admissible in evidence, and we intend to resist any presentation of evidence as to what the Juneau Lumber Mills did, unless counsel can offer to prove and make an offer of proof that they will show a contract binding upon the Juneau Spruce Corporation to employ, or to continue to employ, the members of Local 16. We are sort of anticipating the evidence here, and we realize this witness is being called out of turn, and there may be [600] some evidence that the Juneau Spruce Corporation is bound by a contract with Local 16 to hire the members of that organization or after hiring—or, and after hiring them, to continue. If such an offer is made it might be admissible, and if not, it will not be admissible. We would like to take that up. It will involve argument on a legal question.

Mr. Strayer: I would like to add that we understand the defense is built on past practice, so determining this now we may shorten the case, looking toward the time the defense starts putting on its own testimony.

The Court: Do you want to state your side?

Mr. Andersen: I believe from what counsel said, it is rather clear. The witness Mr. Schmidt is a witness who has already been here, of course. He was a manager or something of the Juneau Lumber Company and worked for plaintiff in this. It has even been raised in this case whether or not there was a written contract or contracts between the Juneau Lumber Mill and Local 16. As a matter of fact, your Honor will recall the testimony of Mr. Flint, here. He said after some sort of investigation had been made he was permitted to answer, over objections, that as a result of the investigation he determined the statements were false. We have here a contract specifically between the Juneau Lumber Mills and Local 16, may it please the Court, which we will offer in evidence at the appropriate time. The witness will also [601] testify that the same hiring practices will carry over to Juneau Spruce as had obtained under Juneau Lumber. Now, of course, a contract may rest in writing or may rest in parol and from that simple statement, may it please the Court, I think the scope of the direct examination would be as broad as that implies. In other words, we are going to show the written contract which was adopted between the parties; that is, the Juneau Spruce——

Mr. Banfield: May it please the Court, I think counsel has left out any offer of proof as to one necessary step. He might very well offer this written contract with the Juneau Lumber Mills and argue that he will offer proofs that the same practices continued as to hours, wages and conditions of employment. That would not bind the employer, Juneau Spruce Corporation, to keep these men in this employment.

The Court: When you say "these men" you mean longshoremen?

Mr. Banfield: Longshoremen. No obligation is implied to keep them in the employer's employment unless the Juneau Spruce Corporation had in some way or other obligated itself to continue the employment of longshoremen. It is just as simple as this: that if you have—if you buy out a grocery store and employees are working there, and you continue and [602] go on employing the same persons, but that does not prevent you from discharging those employees and hiring others. There is nothing in this act which prohibits you from doing that. There is nothing unlawful or illegal about it. If the Court will notice the language of the statute under which we are suing here, it is apparent Congress had no intention that you continue anyone in employment unless, of course, you have an agreement to continue them in their employment; then you are bound, but so is anyone else in any other contractual relation with an employee. This section simply states that it is unlawful for a labor

organization to engage in or to induce a strike or to perform services for the employer where the object thereof is to force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class, rather than to employees in another labor organization or in another trade, craft or class. In other words, suppose there were longshoremen down there in the employment of the Company on April 9, we will say, and these longshoremen were performing all of the work of loading lumber on barges. Unless those longshoremen have a contract with the employer whereby they can force the employer to continue hiring them, which is then specified in the contract, the employer is free to discharge those employees and assign the work to someone else, and any time a labor organization throws up a picket [603] line to force the employer to assign work to them, instead of those to whom the employer assigned it, then the act is violated.

The Court: The purpose, as I see it, of counsel's offering the testimony—it is for the purpose of rebuting or qualifying what has already been introduced as part of your case in chief. I think that is plain from what he said a moment ago, and for that I think it is admissible.

Mr. Banfield: If the Court please, the statement of Mr. Flint was they claimed they had a contract that was binding on the Juneau Spruce Corporation. Now, counsel has offered to show there is

such a contract with the Juneau Lumber Mill, and that the practice carried over, but he has not offered to show that the contract was binding upon the Juneau Spruce Corporation for any period of time whatsoever. Mr. Flint's testimony can only be rebutted by showing it is binding on the Juneau Spruce Corporation. Mr. Flint doesn't deny they had a contract with the Juneau Lumber Mill, but what he found as the result of his investigation was that it was not binding on the Juneau Spruce Corporation.

The Court: But that isn't all the testimony, as I recall it, when you consider it is not merely the testimony of Mr. Flint but all your testimony on that point. It would certainly tend to show that there was no work of this kind done by the longshoremen before that time. [604]

Mr. Banfield: No, that isn't true, your Honor. Before what time?

The Court: Before the change of ownership.

Mr. Banfield: I think there has been—I think just a lack of testimony that the longshoremen had been employed under the Juneau Lumber Mill. That has not been offered, and counsel would have a perfect right to offer it if he could show that there was an agreement on the part of the Juneau Spruce Corporation to——

The Court: I don't see how his offer or his statement could be construed as implying that he wants to put it in for that purpose. Now, I don't pretend to recall all the testimony that has gone in as to

who did this work before the change of ownership or to what extent, but the impression I have from the evidence submitted on behalf of the plaintiff is that there is testimony to the effect that work of this kind had not been done by the longshoremen before. Now, if I am in error on that, why of course there would be no ground upon which this particular testimony could be received.

Mr. Strayer: I think your Honor is in error in that regard. As I recall the testimony, there were two things; first of all, in the way of representations made by the longshoremen to the I.W.A.—two representations, one was that the longshoremen had a contract with the Juneau Spruce Corporation, which, it was testified, they found was false, [605] and Mr. Banfield has pointed out that no evidence is admissible to rebut that unless, in fact, they showed that there was a contract with the Juneau Spruce. The second thing, this particular work of loading barges, was longshoremen's work done by the longshoremen everywhere up and down the Pacific Coast, which Mr. Flint discovered since was false. I think the latter point is what your Honor is thinking about, the precise thing for counsel to rebut. If he could show that all longshore work up and down the Pacific was done by longshoremen; that is, all barge loading was done by longshoremen, but to show that the Juneau Lumber Mill had employed longshoremen for loading barges wouldn't show the general practice as represented by the longshoremen. This same problem

was before the National Labor Relations Board in proceedings before that Board. I assume the evidence they intend to offer here was that offered before the Board, and found by the Board not to be a contract with the Juneau Spruce Corporation. They didn't have the question of rebutting testimony, but I submit there is no testimony which could be rebutted in work done for the Juneau Lumber Mill.

Mr. Banfield: I have to disagree with my co-counsel. Mr. Flint did testify, as I remember, in addition to the charge that the contract carried over, he said they also represented to him they had the same practice up and down the Coast. Then he said also that the longshoremen told them there [606] was a past practice of the longshoremen loading barges, and that he investigated that and found that to be untrue. Now, it is true that there was a past practice even with the Juneau Spruce Corporation of loading a certain type of barge with certain type of products. Now, for the purpose of showing that that was false as the past practice, I want to go back to the past practice of the Juneau Lumber Mills. The testimony which they are now offering would rebut to some extent, in fact would rebut the testimony of Mr. Flint, because the Juneau Lumber Mills did use longshoremen for many purposes at the plant. The most force of the testimony was that there was no past practice of loading Company-owned barges with lumber, as they were carrying it on in October of

1947 or in April of 1948, and I think Mr. Flint is entirely correct in that, so that we want to point out to the Court that Mr. Flint did testify to that extent, and this might be used if they could show means of past practice, or what he meant. He meant, I think, by the testimony, that the Juneau Spruce Corporation had not employed longshoremen to load its own lumber on its own barges for shipment to its own customers. They are now attempting to show that Mr. Rutherford did it. What Mr. Rutherford did would in no way be material to this cause. Now, it is only material to show Mr. Flint was not entirely accurate, unless it is specified that there was past practice with all persons of that plant, that had ever owned it. That is [607] the distinction. If it is offered for that purpose, past practice, I think would be admissible on the theory that Mr. Flint testified on all past practice, and that would be material. I don't think the past practices of the Juneau Lumber Mill are material as to whether or not the plaintiff has a cause of action in this case. It doesn't follow that practice under the Juneau Lumber Mills is in any way binding on or requiring the Juneau Spruce Corporation to continue these men in employment. We would be willing to stipulate in the regard that regardless of what Mr. Rutherford did, that he was only testifying to the past practice of the Juneau Spruce Corporation.

The Court: Who?

Mr. Banfield: Mr. Flint was testifying as to

what the past practices were at the Juneau Spruce Corporation. That is the only past practice relevant in this case.

Mr. Andersen: Does your Honor want to hear anything further?

The Court: On the admissibility of this, if you have anything further to say than you have already said——

Mr. Andersen: It seems to me so crystal clear—we are asserting the contract here between the Juneau Spruce and Local 16—we are asserting the contract.

The Court: By the Juneau Spruce?

Mr. Andersen: Yes, and this is going to prove it. [608]

The Court: Then it is not merely a case of qualifying somebody else's testimony, but you claim it is admissible as part of your defense.

Mr. Andersen: Yes, your Honor, and also that it will impeach Mr. Flint because Mr. Flint said, if I can try to paraphrase his evidence, he said "They came and told us that they had had a contract"; that is, Local 16. Remember Mr. Flint talked about a Coast-wise contract signed on behalf of all by the International? He testified something like that so then he said "They came to us and told us they"—meaning Local 16—"had a contract with the Juneau Lumber which in their opinion carried on over when the Juneau Spruce took over." That is practically his verbatim testimony. On direct examination he further testified "We in-

vestigated that and found out that statement was false, that Local 16 never had a contract with Juneau Lumber." That is verbatim testimony, your Honor. It goes in for two purposes: to impeach Mr. Flint and to show a contract between Juneau Spruce and Local 16. That is what we will offer the evidence for.

The Court: You mean this contract to which you refer between the Local and the Juneau Lumber Mill, you contend is binding on the Juneau Spruce Corporation?

Mr. Andersen: Yes, I will.

The Court: By its terms or otherwise?

Mr. Andersen: By adoption, your Honor. [609]

The Court: Wouldn't you have to show first——

Mr. Andersen: At this point I might respectfully state, your Honor, this is an unusual procedure. Usually it is customary for counsel to ask witnesses questions and then have appropriate objections made at the time. This is consuming unnecessary time of the Court.

The Court: It is not an ordinary incident. Here the attempt is made to put testimony in out of order and further, from what you say, that this testimony would be without foundation in this respect, that there would be no foundation that the contract carried over except presumably that which would come from some other witness, but the witness' testimony goes in out of order and it would be improper to receive it. If it is shown by some other person that the contract carried over——

Mr. Andersen: That is our position. Calling out of order testimony taken on nunc pro tunc basis, Mr. Schmidt leaving town, and it is a courtesy to the witness. It only goes into the record when we put in our case in chief.

The Court: It would appear from what has been said here that the contract or evidence of it would be admissible to contradict Mr. Flint. Now then, so far as its admissiblity for any other purpose, such as to show that it was binding upon the Juneau Spruce Corporation, that would depend on the other proof. Subject to that condition it may [610] be received. Call the jury.

Mr. Strayer: May the record show that the evidence is coming in subject to our objection, unless it is so connected up except for the limited purpose of impeachment?

The Court: I think the record shows that.

Mr. Banfield: That is our position.

(Whereupon all twelve jurors took their places in the jury box.

Mr. Andersen: Shall we proceed, your Honor?

The Court: Yes. I think it should be stated to the jury what the purpose of the testimony is otherwise they might——

Mr. Andersen: Testimony, once it goes in, is for all purposes.

The Court: If you don't insist on it——

Mr. Andersen: No.

The Court: Very well.

GEORGE B. SCHMIDT

called as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Andersen:

Q. Mr. Schmidt, you have testified heretofore in this case and have been sworn and testified that you were an official of the Juneau Lumber Company and that you were also an official of the Juneau Spruce Company, up until, I [611] think, January of 1948; is that correct? A. Yes, sir.

Q. Now, while you were with the Juneau Lumber Company, I think you said you were Manager?

A. Vice President and Assistant Manager.

Q. And from 1941 did you have a contract——

Mr. Andersen: Will you mark this for identification please?

The Court: You intend to introduce it with this witness?

Mr. Andersen: Yes, sir.

The Court: I don't think it is necessary to mark it for identification then. Just fix the time.

Mr. Andersen: Very well.

Q. I show you a contract bearing the date June 4, 1941. Have you seen that before, sir?

A. Yes, I have.

Q. Is that a contract between Local 16 here in Juneau and the Juneau Lumber Mills?

A. This one doesn't have the Juneau Lumber Mill name on it, but we had a contract signed for us by the Northland Transportation Company.

(Testimony of George B. Schmidt.)

Q. The same contract?

A. Yes, and they were our agents.

Q. And this contract, dated June 4, 1941, was in effect on [612] April 30 of 1947, is that correct?

A. There was an amendment sometime in 1946, I believe, and the Northland Transportation Company also represented us on that.

Q. So far as still being a contract with Local 16, the same contract still continued in effect; is that true? A. That is right.

Q. So up until April 30, 1947, the contract between the longshoremen and the Juneau Lumber Mills—the longshoremen working here were governed by this contract; is that correct?

A. That is correct.

Mr. Andersen: We offer it in evidence.

Mr. Strayer: May we have a look at the whole thing?

Q. Juneau Lumber sold out to Juneau Spruce on April 30 or May 1 and after that date did you represent Juneau Spruce at that time, I believe, as Assistant Manager? A. That is right.

Q. And you carried on the hiring of the longshoremen in the same way you carried it on under Juneau Lumber? A. Yes, I did.

Q. Now, with respect to the I.W.A. contract, that is, the contract with the Wookworkers there, you of course had a contract with the I.W.A.; that is, Juneau Lumber had a contract with I.W.A.—

(Testimony of George B. Schmidt.)

the same general type of collective [613] bargaining agreement? A. Yes.

Q. Again, Juneau Lumber sold out to Juneau Spruce on or about April 30, 1947? A. Yes.

Q. During the interim between May 1, 1947, and November 3, 1947, the date that another contract was entered into between Juneau Spruce and the I.W.A., did Juneau Spruce carry on under that same contract also?

Mr. Strayer: I object to that as calling for his conclusion.

The Court: Objection overruled.

A. They called in the officers of the Union, the mill called them in on the day the Juneau Spruce took over, and told them they were going to operate along the same basis as they had with the Juneau Lumber Mills, but at any time that the Local, the sawmill workers' Local, wanted to get a contract, to just come up and they would negotiate one.

Q. So in that period grievances were settled under the old contract, and wages were paid under the old contract? A. That is right.

Q. Now, I believe that is——

Clerk of Court: Defendant's Exhibit——

Mr. Andersen: I think it is "C." Leave it blank until I check. I would like to read a portion of the record. [614]

Mr. Strayer: Is that the contract? Has that been admitted?

The Court: As I understood it, after it had a

(Testimony of George B. Schmidt.)

number or letter on it, you were going to show it to counsel?

Mr. Andersen: That is right.

(The document was passed to counsel for plaintiff.)

Mr. Strayer: This appeared to have been terminated September 31.

Mr. Andersen: It has an annual renewal clause.

Mr. Strayer: That is what I am trying to find.

Mr. Andersen: It is in there someplace. Counsel informs me that—Mr. Paul—this is the contract they operated on all during the period. I will offer it in evidence as Defendant's Exhibit C, your Honor.

Mr. Strayer: May the record show an objection, a general objection to this material. I understand it is being admitted subject to being connected up?

The Court: It will be admitted subject to being connected up in the manner indicated some minutes ago.

(Whereupon the document was marked Defendant's Exhibit C.)

Q. There are three signatures on Exhibit C in the righthand corner. Do you recognize the signatures?

A. I don't recognize the signatures. I know the men.

Q. Who were those three men? [615]

A. Sam Elstead is a longshoreman, and Mr. Ernest Buck, and so is Davis.

(Testimony of George B. Schmidt.)

Q. They were, to your knowledge, members of Local 16? A. That is right.

Mr. Andersen: I would like to read a portion of this, may it please the Court.

The Court: You may do so.

Mr. Andersen: "Section 1, that part reading 'transfer from vessel to first place of rest,' be amended to read 'transfer from and including vessel's sling to first place of rest.' It is recognized by I.L.W.U. No. 16, and agreed, that the three steamship companies, namely Alaska Steamship Company, Northland Transportation Company and Alaska Transportation Company, have an agreement with the Sailors' Union of the Pacific which gives members of that organization preference in the loading and discharging of cargo." That is the only portion I wish to read.

Q. Now, as an official of the Juneau Spruce Corporation, you were the auditor also, were you not?

A. I acted in that capacity to start with. Toward the end my duties were others, so——

Q. Were you familiar with the financial assets of the corporation? A. Yes.

Q. And you were familiar with the financial assets of the [616] corporation from May 1, 1947, to and including what day?

A. About January 19, 1948.

Q. And that is a period of eight months and a half? A. Yes.

(Testimony of George B. Schmidt.)

Q. During that period of time, Mr. Schmidt, and at the Juneau mill here in Juneau, what if anything were the net profits of the Company?

A. The profits of the entire organization up to the balance sheet, as I recall it, and my figures might be a little bit hazy, about $130,000.

Q. What were the profits of the corporation at the Juneau mill in Juneau, Alaska?

A. Somewhere around $60,000.

Q. During that eight month and a half period?

A. Yes.

Mr. Andersen: That is all. You may examine the witness.

Cross-Examination

By Mr. Banfield:

Q. Now, Mr. Schmidt, testifying as to the practice of the Juneau Spruce Corporation in hiring longshoremen, you testified you hired them in the same way as for the Juneau Lumber Mill, Inc.?

A. That is right. [617]

Q. What did you mean by that?

A. The work that we had for them to do at that time was work loading these boats that came in; you know, fishing boats or scows that came in. For someone else's scows we hired longshoremen for the benefit of the purchaser of the lumber.

Q. You said in the same way?

A. I called them up and had them come down.

Q. Was there ever any discussion as to how

(Testimony of George B. Schmidt.)

much they would be paid, what hours worked, conditions of employment?

A. We paid the going wage, which was in effect at the time. The fact of the matter is, we were presented with a bill by the longshoremen's boss and we accepted that.

Q. You hired them from time to time under the current conditions that they worked in Juneau?

A. That is right.

Q. Was the Juneau Spruce Corporation in any way obligated to hire them?

Mr. Andersen: I will object.

Mr. Banfield: May it please the Court, this is cross-examination. This is a defense witness put on as his own witness. I have a right to cross-examine to show exactly how they were hired, whether there is any better evidence of hiring, any contract, any obligation to hire, or if they were hired from time to time and let go, or whether they were steady [618] employees. I have a right to show all the conditions of this employment, after he brought out that it was the same way.

Mr. Andersen: I will waive.

A. The question again, please?

Q. Was the Juneau Spruce Corporation obligated to hire these people for this particular work? Did they have to hire them?

A. We were requested in most cases to get longshoremen by the people whom we hired longshoremen for.

Mr. Andersen: I ask that be stricken as not

(Testimony of George B. Schmidt.)

responsive to the question, may it please the Court.

Mr. Banfield: I will follow that up, your Honor.

Q. In other words, you mean you were obligated in so far as other people, customers, requested you to hire them for their account?

A. Yes, because they were paying for it.

Q. Did Juneau Spruce Corporation have any contract with these longshoremen? A. No.

Mr. Andersen: I am going to ask that that last answer be stricken as calling for a conclusion and opinion of the witness, may it please the Court. I think we have already established through this witness that the same kind of practice continued under the Juneau Spruce that obtained [619] under the Juneau Lumber. Now, I move the answer be stricken on that basis.

Mr. Banfield: If the Court please, I wrote down his specific answer. His answer was "Yes, I did." He was asked if he hired longshoremen in the same way, which is leading. I took no objection. I wanted to make sure it stood that way; what it means. The same way means same manner.

Mr. Andersen: I will waive the objection. Go right ahead, counsel.

The Court: Proceed.

Q. Was this intermittent or steady work?

A. Intermittent.

Q. How often did they work?

A. I couldn't answer that exactly, except whenever boats come in for lumber of that kind then we hired some longshoremen. Probably ten or twelve

(Testimony of George B. Schmidt.)

cases, something of that sort, during the period that I was there.

Q. How many hours would they work each time?

A. That depends entirely on the volume of work to do.

Q. What would be the minimum?

A. About two hours, I guess, something like that.

Q. What would be the maximum?

A. It might be a day; it might be two days.

Q. Would it ever be a week?

A. Rarely. I don't recall any time it was a week. [620]

Q. Do you recall any time that longshoremen worked more than two days at a time?

A. Not off hand. That could be, but I don't recall it.

Q. Now, when the Juneau Spruce Corporation took over, Mr. Schmidt, you say it called in the members of the I.W.A. Local, or its officials, and told them that you would operate in the same way that the operation had been conducted in the past. Was there any agreement as to how long this would continue?

A. Just to the time they wanted to negotiate a contract, and when they got ready to negotiate a contract they would let us know and we would negotiate one with them.

Q. Was there any obligation on the part of the Company to continue past practice indefinitely?

A. I would say to the extent that we agreed to do it verbally.

(Testimony of George B. Schmidt.)

Q. For how long did you agree to do it?

A. Until the boys wanted to negotiate a contract.

Q. Until the I.W.A. wanted to negotiate a contract? A. That is right.

Q. What kind of work did these longshoremen do when they were hired during this period?

A. They loaded scows or boats.

Q. That is during the period you were employed there? A. That is right.

Q. Whose boats or scows were they? [621]

A. Sometimes some of the scows were Sommers Construction Company's, and fish companies, Astoria and Puget Sound, and Booth Fisheries to Pelican.

Q. Did the vessels the longshoremen loaded ever belong to Juneau Spruce Corporation?

A. No.

Q. Did Mr. Rutherford or the Juneau Lumber Mill, Inc., ever employ longshoremen to load barge loads of lumber for shipment to points in British Columbia or points in the United States?

A. No.

Mr. Andersen: To which I will object as improper cross-examination, may it please the Court.

The Court: Objection overruled.

Q. Were such shipments made to Canada and the United States?

A. Not by barge. It only went by the standard steamships.

Mr. Banfield: I think that is all.

(Testimony of George B. Schmidt.)

The Court: Well, the previous answer assumed that barges of lumber were sent out, and the next answer was to the effect that none was used. It seems to require clarifying, doesn't it?

Mr. Banfield: I think we have to keep in mind—I am not talking about—I asked if the Juneau Lumber Mill ever shipped any lumber by barge to British Columbia or——

The Court: That was the last question, but I thought [622] he said in the previous answer——

Mr. Andersen: He said it was all shipped on regular boats.

Mr. Strayer: He testified that longshoremen were not used to load barges for the Juneau Spruce and that the Juneau Lumber Mill never shipped by barge to the United States or Canada.

Mr. Banfield: That is all.

Mr. Andersen: That is all. Thank you, sir.

(Witness excused.)

FREEMAN SCHULTZ

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your name please?

A. Freeman Schultz.

Q. Where do you reside, Mr. Schultz?

(Testimony of Freeman Schultz.)

A. Juneau.

Q. Mr. Schultz, when did you first come to Juneau? A. Late in January of 1947.

Q. And for whom were you employed at that time? A. Coos Bay Lumber Company.

Q. And what was the purpose of your visit to Juneau in January, 1947? [623]

A. To inspect the mill of the Juneau Lumber Mill.

Q. Did you inspect it? A. I did.

Q. Tell me the condition that you found at that time of the, say the buildings first. What was the condition of the buildings of the Juneau Lumber Mill, Inc.?

Mr. Andersen: To which I will object as incompetent, irrelevant and immaterial, may it please the Court.

The Court: Objection overruled.

A. This was a very cold period in the winter and it didn't give me a good opportunity to inspect the plant thoroughly, but it was quite obvious that there had been a fire, and the buildings showed signs of fire. The sawmill and remanufacturing building showed indications of fire all over it. Where I could see through the dock it showed the dock was in poor state of repair. The burner, as I remember it, had some holes. One or two smokestacks were down in the boiler room, they had fallen over.

Q. Mr. Schultz, let me stop you there. You say

(Testimony of Freeman Schultz.)

the dock was in poor repair? Were the buildings built on the dock itself? A. Yes.

Q. In other words, supported by piling?

A. It is all on piling. There is rock under part of it, but it is still on piling. [624]

Q. You stated that it was in bad repair. How bad repair?

A. I couldn't tell too closely because of the snow and ice on there, but it indicated signs of decay and it hadn't been more than for a period, I would say, of three or four years. It was obviously run down.

Q. This fire you said there was evidence of everywhere, was there a substantial loss by fire?

A. That I don't know. I could see the joists and beams in the ceiling and all that had been charred by fire. It was holding up the load and would be adequate.

Q. The fire damage had been repaired?

A. Yes.

Q. Completely repaired? A. No.

Q. This burner—what kind are you talking about? A. Refuse; incinerator.

Q. The thing that burns up waste slabs?

A. Waste slabs, and throws the sawdust all over town.

Q. This boiler room; what is that?

A. Where the steam is generated for the steam engines in the sawmill and for the electric turbine.

Q. What was the condition of any other structure; did you notice?

(Testimony of Freeman Schultz.)

A. They had a remanufacturing plant that was in the middle of the dock and looked like the Toonerville Trolley, things [625] leaning this way toward Jones'. It was very dilapidated.

Q. How was the log pond?

A. There was none. There was a steeve boom, or floating boom, along the edge of the dock and then there was a float that had a polesaw or drag-saw on it that they could cut the end of the logs off, but they had to stick the logs underneath the mill. It was a very poor location.

Q. How long is this dock?

A. The sawmill sets in the middle of it. From the extreme south end to the extreme north end—it isn't true north and south—I would say it is about eleven hundred feet, as I remember it.

Q. Is it all supported on piling?

A. Yes, at least along the front.

Q. The commercial sort or native piling?

A. Native; some spruce, some hemlock.

Q. How about the outbuildings, sheds and things like that?

A. The building that Mr. Rutherford called the retail shed was in a fairly good state of repair. He had another building on the face of the dock that contained the machinery of an ordinary repair shop; that is, lathes and blacksmith's forge and welding outfit and stuff like that. That was quite,

(Testimony of Freeman Schultz.)

oh, dirty, and looked to me more as a firetrap. [626]

Q. What was the condition of the machinery in this plant? Take the power house, for instance.

A. Well, in the power house it was quite evident that there was need of considerable break work. The boiler fittings, they were down in places and bulged out in other places, and then the roof had quite a sag in it and, as I said before, one or two stacks was clear down, and the trestlework over the top of the boilers had quite a sag in it; just in need of repair.

Q. How about the burner?

A. Well, they had a single screen in it rather than a normal double screen. It was a fire trap rather than being an efficient burner. It had a conveyer leading to it. At one time it had a place in it that you could cut wood out of the burner, out of the conveyer going to the burner, and that had ups and downs on it. It wasn't on a true course, and the burner itself had holes where the sheetmetal had rusted through.

Q. How was the condition of the machinery in what you call the band room where primary or first cuttings are made?

A. The band mill—the wheel had been greased to protect it from rust. It looked to me like a good standard make of band mill, and appeared taken care of, a very good unit.

Q. And the carriage?

A. The carriage showed lack of care. In some

(Testimony of Freeman Schultz.)

places it had [627] been patched, in some places with wood and some places with metal. It was an old-fashioned carriage, obviously not worth much value.

Q. How about the various pieces of machinery in the mill, such as planers and resaws, and various type motors and things; what was the general condition of them?

A. I would say they looked like they had been kept in a fair state of repair.

Q. Were they fairly well adapted to modern use, or had they had necessary improvements on them?

A. I objected to the size of the edger. It would be too small for the type of business I thought we would go after. The trimsaw looked to me to be adequate. The main resaw was, if the head were renewed, a very modern unit, but the placing of the machinery—to get to the resaw and away from it—appeared very inadequate. Of course I didn't see the green chain in operation. None of this mill was in operation. It was a case of observation. It happened to be a little bit unique. I had never seen one quite that way.

The Court: Wouldn't it save time to have the witness state the condition he found the mill in instead of having his attention called to each phase of it?

Mr. Banfield: If the Court please, I have finished that phase of it. [628]

(Testimony of Freeman Schultz.)

Q. Mr. Schultz, when next did you come to Juneau?

A. The fourth day of June, 1948.

Q. In the meantime, had the Juneau Spruce Corporation purchased all these assets?

A. Yes.

Q. When this purchase was made was Juneau Spruce Corporation a new company or had it been in existence before? A. No, that was new.

Q. A new corporation?

A. A new corporation.

Q. Were you an official of the corporation at the time it was formed and afterwards?

A. I helped form it. I was in on the details of the formation of the corporation, and I bought stock and I was elected a Director at the first meeting.

Q. Have you participated in the affairs of the Company ever since?

A. As a Director, or one that would know general policy or detail in the formation of the Company.

Q. Were you acquainted with the plans of the corporation at this time?

A. I helped make them.

Q. What was your plan with regard to any changes in the physical properties themselves and the ultimate use to which they were going to be placed after the plan was [629] executed, and how long it would take? Tell your plans generally.

(Testimony of Freeman Schultz.)

Mr. Andersen: I object to that as hearsay.

The Court: It is what they did. They might not have carried out the plans.

Q. Tell us what you did in changing things and in changing the production and plant itself?

A. What I did?

Q. What the Directors did?

A. Well, the first thing we wanted more production through the mill.

Mr. Andersen: I move that be stricken, may it please the Court, as not responsive to the question, what was done?

A. We asked that a second shift be put on the mill to get production.

Q. Was that done? State if a second shift was put on and when, etc.

A. I can't tell you when, but as soon as Mr. Hawkins could get the second shift going we asked that it be done.

Q. What else was done with regard to the plant itself? A. That preparation be made——

Q. Don't tell what the Directors asked Mr. Hawkins to do; tell what was done by Mr. Hawkins or anybody else as the result of the Directors' instruction. If they sold [630] equipment or disposed of the plant or what did they do?

A. We bought more equipment.

Q. Tell us what you did.

A. We asked that Edna Bay——

Mr. Andersen: I move that be stricken as not responsive.

(Testimony of Freeman Schultz.)

The Court: Yes.

Q. I don't want you to state what you asked somebody to do, but what Juneau Spruce did.

A. They spent a half million dollars worth of equipment for the logging camp at Edna Bay. We purchased another tugboat.

Q. Did they do anything with respect to the dock property? A. Yes.

Q. What did they do?

A. A lot of these docks were taken out and replaced with rock. The remanufacturing shed was torn down. The machine shop was removed from the dock face and then put in a better location for plant operation and fire protection.

Q. Was there any particular change in the mill itself during the operating season of 1947?

A. No; you couldn't repair and operate the mill at the same time. It had to go along as best it could.

Q. Were there outside repairs done, outside work? [631]

A. These buildings were taken down.

Q. Was any additional land purchased?

A. Yes, on the north end of the property, between there and the City Dock property and the City Cafe.

Q. During the winter shutdown of 1947-1948, what was done at the plant?

A. As I remember, there was about $60,000 in repairs in the boiler room itself.

Q. You mean just in the power house?

(Testimony of Freeman Schultz.)

A. Just in the steam boilers, and it was about—it seems foolish—eight or ten thousand dollars' worth of parts for the electrical turbine, ordered and installed.

Q. Were these expenditures necessary?

A. Well, they were advisable. The Allis-Chalmers representative that was supposed to be an expert on turbines recommended that, and you could almost carry them in your arms, but they cost a lot of money.

Q. Tell us what else was done.

A. The edger was removed from the sawmill and there was a new—well, larger—one, and a larger motor, which meant they had to go back with a power line to the power house. There was new transformers on account of the increased use of electricity installed. There was a small replacing of the machinery in the planing mill to get a better flow of lumber. There was a transfer chain installed in [632] the mill itself, so that the lumber would flow through the mill with the least interruption and the green chain itself was changed. The machinery from the remanufacturing plant was located underneath the mill to better advantage than it had been.

Q. From an operating standpoint, what was the condition of the mill when you arrived on June 4, 1948?

A. Well, it was improved over what it was when I saw it in 1947.

(Testimony of Freeman Schultz.)

Q. Had the money, in your opinion, been prudently expended there?

A. Say that again?

Q. Had the money that was expended on these changes been prudent and wise?

A. Largely. It would be a question of opinion or judgment of different individuals.

Q. In other words, what you mean to imply by that——

Mr. Andersen: I object to that. The question has been asked and answered and it is calling for the witness' conclusion.

The Court: Yes, unless there is something in the question which doesn't call for what appears to be merely speculative matter. That would end it.

Q. Mr. Schultz, when you arrived in June, 1948, what quantity of lumber was this mill capable of producing? [633]

Mr. Andersen: I am going to object to this as cumulative, may it please the Court. They have already had a couple of witnesses testify to this general point.

Mr. Banfield: If the Court please, we have had Mr. Schmidt testify that when he left in December, 1947, the mill was in condition in his opinion to produce a certain amount of lumber. That is the only testimony we have had on that point of which I have any recollection.

The Court: Objection overruled.

A. The mill was down and we would have to go

(Testimony of Freeman Schultz.)

back to your records of March and April, when the mill started up. As I recall those, they indicate apparently 100,000 feet in eight hours.

Q. Were those records of the first days of production and the short period they worked in the spring of 1948, be indicative of what the mill could produce on an average for 1948?

Mr. Andersen: I object to that as calling for the opinion of the witness.

The Court: Objection overruled.

A. They should increase over a period of years. I have always found that mill efficiency increases as time went on and the men got more accustomed to their jobs and at this time there was a big snow, at the time they were starting the mill, and they had quite a bit of difficulty around [634] the mill, getting lumber to and from the mill.

Q. Did you take over as Manager of the Juneau Spruce Corporation? A. Yes.

Q. On what date?

A. I arrived here the fourth of June; actually I was the Manager before that.

Q. For how long?

A. Oh, the first of June.

Q. Mr. Schmidt, when you took over——

Mr. Andersen: Mr. Schultz.

Q. Mr. Schultz, I am sorry—when you took over on June 4 how many men were employed there?

A. Eight, eight or ten.

Q. Are you speaking of mill hands or overall?

(Testimony of Freeman Schultz.)

A. That is all the men I found at the plant.

Q. Will you tell us what activities were engaged in by the Juneau Spruce Corporation after that date? What did the Company do? Did it continue, close the mill or operate, or how many men were employed, or what?

A. Immediately after that date there was nothing done. We continued on with these eight to ten men on a repair basis. There was a job of patching things up that needed to be fixed quite obviously, until—I am not quite sure of the date, but I remember it was a Saturday afternoon [635] that a bunch of them came and wanted to know——

Mr. Andersen: I will move—I will object to this as incompetent, irrelevant and immaterial.

Q. Just tell what happened.

A. A group of men appeared.

Q. What did they do after they came?

A. They came in the office.

Mr. Andersen: I ask that a foundation be laid, may it please the Court.

Mr. Banfield: We don't know what men they are yet.

Mr. Andersen: I don't care if you know. I am entitled to a foundation.

The Court: The time and the place.

Mr. Andersen: And persons present.

A. The men came into the office and said they were former employees——

(Testimony of Freeman Schultz.)

Mr. Andersen: I move that be stricken unless a proper foundation is laid.

The Court: I think it is preliminary. Objection overruled.

Q. About what time of year was this Saturday afternoon?

A. Right around the Fourth of July.

Q. 1948? A. 1948.

Q. And exactly where were you at this time? [636] A. In the office.

Q. And who came?

A. The I.W.A. President, and I would say about four or five men.

Q. Whom did they represent themselves to be?

A. The I.W.A.

Q. Now, Mr. Schmidt—Mr. Schultz, I mean—what did you do with these men?

A. Talked to them.

Q. Were they employed by the Company?

A. Not that day.

Q. When? If they were employed, when?

A. After the sixth, I think it is the sixth, a period of two or three days in there, as I remember it. The Saturday was the third, I think, of July, putting the fourth on Sunday—Monday, Tuesday—probably Tuesday, the sixth of July, the men came through and we began hiring a crew.

Q. Now, tell us what that crew did until the mill opened.

A. They started repairing machinery and ad-

(Testimony of Freeman Schultz.)

justing machinery around the mill in preparation for the opening.

Q. How many men were employed at the time of the opening?

A. About fifty-seven, as I remember it.

Q. And did that number increase as the mill continued to operate? A. A little bit. [637]

Q. Was that enough to operate the plant?

A. It was enough to operate, but not to full efficiency.

Q. To what exent was the plant operated; that is, from a production standpoint?

A. All the machinery was operated, but we will say about three-fourths of the efficiency, the reason being that we had certain key men, but other key men we would not have. We had to upgrade or take common labor on jobs a little beyond their ability. As a result the efficiency was down.

Q. Why was it you were not able to get all the labor you wanted?

A. There was a picket line outside there.

Mr. Andersen: I move that be stricken as calling for a conclusion and opinion of the witness.

Q. In what way——

A. A good many men will not go through a picket line, and we were not sure how long we could operate with the picket line—or when the picket line would be removed. We did not care to go ahead and hire a man under those circumstances.

Q. In other words, you didn't want to build up a full force? A. That is right.

(Testimony of Freeman Schultz.)

Q. How long did this condition continue, of just partial operation? [638]

A. Until there was no room on the dock, until about the eleventh of October, 1948.

Q. Why was it you did not want to operate at full production from July 6 to October 11?

A. We didn't want to accumulate a number we couldn't ship. It will deteriorate.

Q. Were you shipping any lumber during this period? A. A couple barge loads.

Q. And when did you ship those barge loads?

A. One late in August, and the other late in September.

Q. Where did the barge shipped in August go to?

A. The tugboat "Santrina" had orders to take it to Prince Rupert.

Q. And was it unloaded at Prince Rupert?

A. No.

Q. Then where did it go to?

A. To Tacoma.

Q. Was it unloaded in Tacoma? A. Yes.

Q. This second barge load—where did you send that? A. To Tacoma.

Q. Direct? A. Direct.

Q. Was it unloaded there? A. No. [639]

Q. How long did it stay in Tacoma?

A. What?

Q. How long did it remain in Tacoma unloaded?

A. Until April 18, this year, 1949.

(Testimony of Freeman Schultz.)

Q. Is it now unloaded? A. Oh, yes.

Q. Now, did you try to ship any lumber by any other methods? A. Repeatedly.

Q. What methods did you try?

A. We tried to ship some by the regular commercial steamers.

Q. To where?

A. Just to put it on the steamer. We had a market for it in Seward. In Alaska we had a market, and we had a market in the States, and we had an export market.

Q. The market in Alaska—how large a market was that?

A. Through our two retail yards we normally expect to merchandise ten million feet annually.

Q. Don't you have three?

A. Yes. One here.

Q. How much can you sell through those three?

A. Approximately twelve million.

Q. Were you successful in getting your lumber delivered to your retail yards in Alaska?

A. The yard in Juneau is at the plant, so I am referring to the plants in Anchorage and Fairbanks. [640]

Q. As to those two, were you successful in getting it on a steamer?

A. Not on a steamer.

Q. Do you know why you couldn't get it on a steamer?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

(Testimony of Freeman Schultz.)

The Court: Objection overruled.

A. The steamship company advised us that——

Mr. Andersen: I move that be stricken as hearsay.

Q. Do you know why you could not get it on the steamer?

Mr. Andersen: Same objection.

The Court: Same ruling.

Q. Answer yes or no. A. Yes.

Q. What was the reason—you don't need to tell what somebody said.

A. The longshoremen would not load it.

Q. Were you able to deliver any lumber to these retail yards by any other methods?

A. We delivered some to the Fairbanks yard.

Q. By what means?

A. By barge from Juneau to Haines and truck from Haines to Fairbanks.

Q. Who loaded this barge in Juneau?

A. The Woodworkers. [641]

Q. That went to Haines. You mean the mill hands? A. Mill hands.

Q. Was it your own barge?

A. We actually loaded it on the stern of the tugboats. We could take a barge or boat. It is our own barge or our own boat.

Q. How did you get it to Fairbanks?

A. By truck.

Q. How much did it cost to deliver the lumber from Juneau to Fairbanks by that method?

(Testimony of Freeman Schultz.)

A. About $54.

Mr. Andersen: That is immaterial, your Honor.

The Court: It is immaterial unless it is compared with something else.

Mr. Banfield: I am laying a proper foundation for showing what our damages were and how it affected our operation.

The Court: I assume then you will follow it up?

Mr. Banfield: Surely.

The Court: You may proceed.

Q. How much did it cost to deliver the lumber from Juneau to Fairbanks by that method?

Mr. Andersen: I object to that. It is purely speculative.

The Court: Objection overruled. [642]

A. As I said, $54 a thousand green lumber, dry lumber, all lumber.

Q. $54 per thousand feet?

A. Thousand feet.

Q. Mr. Schmidt—Mr. Schultz—did you try shipping any of this lumber to Anchorage?

A. Are you referring to the lumber that went from Haines?

Q. Yes. A. Yes.

Q. How much did you ship that way?

A. None. I tried but I couldn't get a trucker that would haul.

Q. Did you try shipping any by steamer to the United States? A. Yes.

Q. And were you successful? A. No.

(Testimony of Freeman Schultz.)

Q. Do you know the reason why you were not successful? Do you know? Yes or no.

A. Yes, I know.

Q. What was the reason?

A. The longshoremen wouldn't load it.

Q. In the absence of steamship service, what other methods could there be to get it to the States?

A. Barge.

Q. Is that all? [643]

A. Our own equipment.

Q. Mr. Schultz, you said that the longshoremen were the cause of your being unable to load on commercial steamers. Is there any other way you can get it on steamers without the use of longshoremen?

A. Not that I know of.

Q. Will the steamship companies let you load it on the steamers and without the longshoremen?

A. I never asked them.

Q. Have you ever seen it done? A. No.

Q. In shipping to the States, to what ports could you ship lumber?

A. Puget Sound ports.

Q. Any place else?

A. British Columbia.

Q. And did you try shipping it through British Columbia? A. Yes.

Q. Where did you try to ship it?

A. Prince Rupert.

Q. Were you successful? A. No.

Q. What was the reason?

(Testimony of Freeman Schultz.)

A. The longshoremen would not unload it.

Mr. Andersen: I move that be stricken as a conclusion [644] and opinion of the witness, no foundation having been laid for that. It is all hearsay.

The Court: Objection overruled.

Q. Mr. Schmidt—Mr. Schultz, I am sorry—did you make any investigation or cause any to be made for you regarding the possibility of shipping through other ports in Briitsh Columbia?

A. No.

Q. Now, I am talking about at all times since you took over as Manager down there, you took over—at all times since you took over the Juneau Spruce Corporation's operations and management, did you attempt to ship to any other places on Puget Sound than Tacoma?

A. We investigated other places, but we didn't try to ship to other places.

Q. What areas did your investigation cover?

A. Port Townsend and Anacortes and Seattle.

Q. Just those three places?

A. And Tacoma.

Q. And Tacoma. And what was the result of that investigation? A. That——

Mr. Andersen: I am going to object to this as calling for a conclusion and opinion of the witness, may it please the Court.

The Court: If he knows he may answer. [645]

A. The ports of Tacoma and Seattle were found to be the only ones we would have with proper

(Testimony of Freeman Schultz.)

facilities down in Puget Sound for disposing of the products.

Q. And were they open to you—Seattle and Tacoma? A. No.

Q. Now, did you actually try shipping any to Seattle? A. Yes.

Q. Were you successful in getting it unloaded?

A. No.

Q. Do you know why?

Mr. Andersen: The same objection, your Honor.

The Court: Objection overruled.

Q. Do you know why? A. Yes.

Q. What was the reason?

A. The tugboat captain was told not to pull into the dock.

Mr. Andersen: I object to that as hearsay.

Q. What was the reason?

A. He was not allowed to dock.

Mr. Andersen: May it please the Court, I move the previous answer be stricken.

The Court: Yes, that part of the previous answer based on conversation will be stricken.

Mr. Banfield: Will the Reporter repeat the last question and the last answer? [646]

Court Reporter: Q. "What was the reason?" A. "He was not allowed to dock."

Q. Who did you have make this investigation for you? A. Mr. Harris.

Q. Who is Mr. Harris?

Mr. Andersen: May it please the Court, I move

(Testimony of Freeman Schultz.)

all this witness' testimony be stricken. It turns out that somebody else made the investigation for him. Obviously it is hearsay.

Mr. Banfield: We are entitled to show what agents of the Company——

The Court: This question is competent. The objection is overruled as to this question. We will see what develops.

Q. Who was Mr. Harris?

A. An employee of the State Steamship Company.

Q. Doing this on your behalf?

A. Yes, sir.

Q. At your instructions? A. Yes, sir.

Q. Did anyone else make any investigation for you? A. Mr. Rogers.

Q. Who is Mr. Rogers?

A. He is our Portland attorney.

Q. Was there anyone else engaged in this investigation?

A. I was down there mayself one trip. [647]

Q. And was the result of all these investigations the same? A. All the same.

Q. Did Mr. Winston Jones make an investigation? A. Yes.

Q. Who is Winston Jones?

A. He is the District Manager of the State Steamship Company in Seattle.

Q. Is he the same Winston Jones that formerly was with the Alaska Transportation Company?

A. That is right.

(Testimony of Freeman Schultz.)

Q. Did Mr. Jones and Mr. Harris make any investigation in Canada?

A. Mr. Harris did.

Q. When was that?

A. That was the time that the barges were first started down to Prince Rupert.

Q. What was the result of his investigation?

A. Those barges were unloaded.

Q. You say that this was at the time that what?

A. You asked me if anyone made investigations at other ports. Mr. Harris did, but the lumber was unloaded in that instance.

Q. Was any investigation made in Canada thereafter?

A. I have had communications with Mr. Youngs.

Q. What was the result of that investigation?

Mr. Andersen: I object to that as hearsay and calling for the conclusion and opinion of the witness.

The Court: If he knows he may answer.

A. We were advised the longshoremen would not unload the lumber.

Q. Did that investigation apply in one place or more than one place?

Mr. Andersen: Same objection, hearsay and calling for the conclusion and opinion of the witness.

The Court: If he knows he may answer.

A. Mr. Youngs; it was just Prince Rupert.

Q. Now, after the mill—or what happened on October the 11th? Answer that—1948?

(Testimony of Freeman Schultz.)

A. We closed the mill.

Q. Why did you close the mill?

A. There was no more room on the dock to store lumber.

Q. Did you have any other places to store it except on the dock? A. No.

Q. Would it be practical to store it anyplace else? A. No.

Q. Was that the sole reason for closing down?

A. Yes.

Q. What was the cause of there being so much lumber on the dock? [649]

A. Because we could not ship it.

Q. Now after October 11 what activities took place at the mill?

A. We had repaired the mill, improved the mill and plant properties as a whole.

Q. Just state the general nature of those improvements during this last winter.

A. We moved the retail shed to the property line to increase our storage area. We built a log pond; we build a bridge connecting the north and south yards; we constructed a fence around the property; we repaired the burner and we did considerable work inside the mill itself in the resaw room.

Q. What type of work is that?

A. We relocated some of the machinery and installed this method of getting the lumber out of the mill.

(Testimony of Freeman Schultz.)

Q. Was this relocation any change in the work done by Mr. Rutherford or the work done by Mr. Hawkins? Who had put it in there originally?

A. Yes, it changed both of them. We changed the location of the green chain that Mr. Hawkins had put around the mill. We ran it a different direction, and then we changed the flow and method of getting the lumber out of the mill itself.

Q. Who had originally determined the flow and method of [650] getting it out of the mill?

Mr. Andersen: I object to that as incompetent and irrelevant and immaterial.

The Court: Unless it is connected with production it is immaterial.

Mr. Banfield: Counsel for defendant has attacked the work done down at the mill by cross-examining other witnesses. He asked if everything Mr. Hawkins did had been torn out and done over again and all been charged as expenses against our damages. That is the purpose. If we have to call the witness back again, I will have to do it. I am trying to lay a foundation here for our expenses attributed to and as a result of this strike.

The Court: The expense of making these repairs? You don't attribute that?

Mr. Banfield: No.

Mr. Andersen: I am surprised at that. I still don't believe he has a right to impeach his own witness.

Mr. Banfield: I am impeaching my own witness?

(Testimony of Freeman Schultz.)

Mr. Andersen: All counsel is trying to do is impeach Mr. Flint, his own witness.

Mr. Banfield: Who?

Mr. Andersen: Mr. Flint, his own witness. That is correct.

The Court: A party has a right to contradict his [651] own witness, as distinguished from impeaching.

Mr. Banfield: As a matter of fact, he confirmed Mr. Flint.

The Court: Even though it is shown that two men disagreed as to some installation that isn't part of the case for either one of the parties, as I see it. Any evidence as to improvements made, unless connected with an increase in production or decrease in production would be immaterial.

Mr. Andersen: Also, I further object to it as speculative, may it please the court—entirely speculative.

The Court: You can hardly say whether or not improvements made at a certain time has any speculative element in it.

Mr. Andersen: Not as to improvements.

Mr. Banfield: There is another purpose, and that is this: counsel attacked the witness Flint and tried to imply he was employed there as an official of the Union and not doing anything and getting paid a big exorbitant wage and no need for it.

The Court: This, if it is sought to be elicited, that Flint was not engaged in unnecessary work, would be perfectly proper.

(Testimony of Freeman Schultz.)

Mr. Strayer: The importance of this testimony as I see it is that plaintiff must show, to prove damage, that before the strike and during the ensuing year they could have [652] manufactured and sold a certain amount of lumber. Mr. Andersen attacked it on the basis that it was poorly constructed by Mr. Hawkins and there were bottlenecks, and Mr. Schultz had to tear out all of it and put in new. To meet that kind of contention, we are entitled to have Mr. Schultz, the new Manager, tell what changes there were as the result of the improper construction methods of Mr. Hawkins. As the basis for his opinion of what the production would be from the shutdown to the present time, and for the further reason, he needs that as a basis for production after he made his extended investigation.

The Court: If it is connected with the production it is material, otherwise I can't see that it is.

Mr. Andersen: In the words of the poet, "Methinks these gentlemen protest too much." I was examining Mr. Flint, as your Honor will recall; Mr. Flint says the mill was full of bottlenecks and a lot of equipment Mr. Hawkins put in had to be taken out. I was examining him and that came out voluntarily, as far as I was concerned. The Court cut off that line of questioning as far as I was concerned, though I endeavored to pursue it. I think the Court's ruling was incorrect, maybe I am wrong—at least the Court ruled and I desisted

(Testimony of Freeman Schultz.)

too. I submit all this testimony is immaterial. The gentleman may testify what was done, but why should they try to rehabilitate Mr. Flint? They are trying to show he was a fine [653] boy, where, as a matter of fact, their own witness, subject to preliminary examination, said the mill was full of bottlenecks.

Mr. Banfield: He can't back that up in the record. This has gone a bit too far. I think the Court should caution counsel that it should not be permitted.

The Court: There is nothing that prevents a party from contradicting his own witness by another witness. All I am calling attention to is that whatever work was done down there, to be made competent as proof, would have to be connected up with production. The objection will be overruled, with the admonition to be brief about this and connect it up with production. We are not making very fast progress in this case.

Q. Now, Mr. Schultz, in making these changes you spoke of and relocating the green chain, what was your purpose in doing that?

A. To relieve that bottleneck. The lumber backed out—couldn't get out of the mill onto the green chain; bottlenecking. It was to relieve that.

Q. How did you rebuild the green chain?

A. We moved a section of it over and we installed a new section in there so we delivered lumber onto the green chain on the lower floor in four places rather than one.

(Testimony of Freeman Schultz.)

Q. Was that an improvement over what Mr. Hawkins had, or a [654] change from what Mr. Hawkins had done?

A. In my opinion, a distinct improvement.

Q. Was any part of this due to improper installation by Mr. Hawkins? A. No.

Mr. Andersen: I object to that as calling for an opinion of the witness.

The Court: Objection overruled.

A. This was entirely new from anything that Mr. Hawkins had.

Q. You heard the testimony of Mr. Flint?

A. Most of it.

Q. Is that the bottleneck to which he referred?

Mr. Andersen: I object. One witness cannot comment upon another.

The Court: Objection sustained.

Mr. Strayer: Are we precluded from showing that Mr. Flint testified that the bottleneck consisted of the backing up of the green chain?

Mr. Banfield: I asked if it was the same as Mr. Flint testified about.

The Court: The question—having already testified as to the chain—whether it is the same incident to which Mr. Flint testified is a matter for the jury.

Q. How many green chains do you have down there? A. One. [655]

Q. Now, Mr. Schultz, have the longshoremen ever contacted you or talked to you regarding a settlement of this dispute? A. Yes.

(Testimony of Freeman Schultz.)

Mr. Andersen: May I interrupt? Will you read the question, Miss Reporter?

Court Reporter: "Now, Mr. Schultz, have the longshoremen ever contacted you or talked to you regarding a settlement of this dispute?" A. "Yes."

Q. You may answer the question.

The Court: He has answered.

A. Yes.

Q. When was this?

A. I would say about the middle of October, 1948.

The Court: When you say "longshoremen" you should indicate whether it is the Local or the International.

Mr. Banfield: Yes.

Q. Who contacted you?

A. Mr. Vern Albright wrote me a letter requesting a conference.

Q. And did you have a conference?

A. Yes.

Q. Who was present at the conference?

A. Mr. Albright and Mr. Pearson, Mr. Flint and Mr. Francis, as I recall, and Mr. Banfield and myself. [656]

Q. And who did Mr. Albright represent himself to be?

Mr. Andersen: I object, the same objection as heretofore, so far as the International is concerned —hearsay, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

(Testimony of Freeman Schultz.)

A. Mr. Albright said that he was the International Representative, appearing on behalf of Mr. Bulcke, and Mr. Pearson was the President of the Local.

Q. Tell me, what did they say and who said it? Who did the talking?

A. Mr. Albright did practically all of it.

Q. That would be for the Local and the International? A. Well——

Q. You said Mr. Albright did practically all the talking? A. That is right.

Q. Who talked for the Company?

A. I did.

Q. What did Mr. Albright say?

A. The first thing he told me was that they had a picket line out there and were prepared to keep it there for twenty years if necessary, and he wanted to negotiate.

Q. What was the reply of the Company to that conversation?

A. It was his business how long he kept it there.

Q. Is that what you said?

A. That is right. [657]

Q. And he said he wanted to negotiate?

A. That is right.

Q. Is that what you said?

A. That is right.

Q. Did he state what he wanted to negotiate, or what terms of negotiation—tell us what he said.

A. He had a letter in his pocket that said Mr. Bulcke had a proposal that was made in Portland,

(Testimony of Freeman Schultz.)

and he had been down there and the letter instructed him to come and work out an agreement with us up here.

Q. And what was your reply to that?

A. That we were—we had instructions not to negotiate, but we were willing to go around those instructions from my superior, if it could result in an agreeable settlement.

Q. Did you—you said you told them, "We have instruction not to negotiate." Who did you mean by "we"? A. The Company.

Q. The Company had instructions?

A. The President of the Company had told me not to sign any contracts here, that they had to be signed in Portland.

Q. Was the Company willing to negotiate in Portland at that time? A. Yes.

Q. What was the purpose of this meeting in Juneau?

A. The purpose was to get some facts as to the situation up [658] here.

Q. Who wanted the facts?

A. Mr. Bulcke.

Q. Mr. Albright said what?

Mr. Andersen: I assume this is conversation with Mr. Albright, and my same objection goes to it, your Honor?

The Court: Yes.

Q. What did Mr. Albright say he was there to do?

A. To try to reach an agreement.

(Testimony of Freeman Schultz.)

Q. Now, what was the reply of the Company to his proposal to reach an agreement?

A. While we had a contract with the Woodworkers that we felt covered this work, that if there was a dipsute between the Woodworkers and the Longshoremen covering the same job, if the two of them could get together on some sort of basis we could operate and work on, I would be willing to recommend it to the Board or the President of the Company for adoption.

Q. What was done in pursuance to that exchange of conversation?

A. The meeting was over.

Q. Was there any statement by the I.W.A. or the I.L.W.U. as to whether or not they could get together?

A. Yes. The Woodworkers agreed to get together with them.

Q. Did the I.L.W.U. agree to that? [659]

A. Yes.

Q. Has the I.L.W.U., or I.L.W.U. Local 16, ever come back to tell you what the result of those conferences were? A. No.

Q. Was that the only time that you were contacted by the I.L.W.U. since you came here, or by the Local? A. No.

Q. There was another time? A. Yes.

Q. What was that time?

A. I arrived by Pan American early in the afternoon, and that same afternoon—I don't know how they found it out——

(Testimony of Freeman Schultz.)

Q. What arrival are you speaking of?

A. June 4, when I first came here.

Q. Go ahead.

A. The telephone rang and a man said his name was Chris Hennings. He asked me if I would appear at a meeting. He explained he was the Alaska Representative, as I understood it, of all C.I.O. Unions, as I understand it, and asked me if I was willing to come to a meeting of the Union.

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial and ask that it be stricken.

Mr. Banfield: It will be connected up.

The Court: If it isn't, it will be stricken. [660]

Q. Did he say who would be there?

A. No, he didn't.

Q. Did he say he was acting on behalf of Local 16 or the International, or at their request?

A. I didn't get it quite that way. I was new and didn't know what he was getting at. As I understood it, it was all C.I.O. Unions.

Q. Now, Mr. Schultz, if there had been no picket line, at the mill, what would you have been capable of producing in lumber in 1948?

Mr. Andersen: To which I object, may it please the Court, as incompetent, irrelevant and immaterial. I fail to see where the picket line has anything to do with that. The testimony is that there are a dozen entrances.

The Court: You can cross-examine on it. Objection overruled.

(Testimony of Freeman Schultz.)

A. As I found the mill when I arrived here in June in 1948 I would say that it was capable of producing in excess of one hundred thousand in an eight-hour shift. That would mean on two, in excess of fifty million in a year.

Q. Do you know what season of the year the plant—in the fall, how late could it have operated, in the fall? A. In 1948?

Q. Yes.

A. About the first of December it would have gone down. [661]

Q. Were the winter conditions such——

A. It began to freeze up the middle of November, the first of December. You can operate with some ice, but not too much.

Q. Would this figure of production allow for normal shutdown, accidents and interruptions?

A. Yes. Day after day you produce. I meant an average of one hundred—we think, one hundred is one hundred thousand—we think in terms of a unit being a thousand feet.

Q. Did the Juneau Spruce Corporatoin have on hand and available to it a sufficient quantity of logs to produce this amount of lumber in 1948?

A. Oh, yes.

Q. How many logs were in Juneau?

A. About eleven million.

Q. Did you have any logs any place else?

A. It seems to me every contractor in the country was after me as to when I would take his logs.

(Testimony of Freeman Schultz.)

Mr. Andersen: I move that be stricken.

Q. I meant, did the Juneau Spruce own any logs any place else? A. At Edna Bay.

Q. How many?

A. About two hundred thousand feet in the water, and nine to ten million feet down in the woods.

Q. Did you own any logs still in the possession of contractors? [662] A. No.

Q. Or contract loggers? A. No.

Q. Had the Company agreed to buy any logs from contract loggers? A. Yes.

Q. How much had it agreed to buy?

Mr. Andersen: To which I will object, may it please the Court, as not the best evidence.

The Court: Objection overruled.

A. As I remember it——

Mr. Andersen: I add a further objection to all this testimony that it is speculative.

Mr. Banfield: I am afraid my last question might be somewhat confusing. I will withdraw it and proceed this way:

Q. Mr. Schultz, were there logs available from private loggers? A. Yes.

Q. And do you know how much was available in 1948 from private loggers?

A. From June on, I had been advised how much would be available during the winter and spring.

Q. By whom?

A. Mr. Hawkin's report.

(Testimony of Freeman Schultz.)

Mr. Andersen: I object to that as hearsay. [663]

A. And copies of letters I have seen.

The Court: That is hearsay. It will be stricken.

Q. Could you have bought an additional thirty million feet of logs on the market? A. Yes.

Q. In Alaska? A. Yes.

Mr. Andersen: I object to that as speculative.

The Court: Objection overruled.

A. I could have got forty million.

Mr. Andersen: I move that be stricken as not responsive.

The Court: For the benefit of counsel, the objection which has been frequently made that the answer is not responsive, is available only to the party making the examination. Objection overruled and motion denied.

Mr. Andersen: I think your Honor is correct in that ruling.

Q. Did you have the tugboats necessary to bring these logs into the mill? A. Yes.

Q. How many did you have?

A. We have three large ones here, and then we have two small ones that can tow logs in a short area around Juneau, in addition to three large ones. [664]

Q. Did you have an adequate labor supply ready and available? A. Yes.

Q. And necessary financing to finance the mill and pay the operating expenses?

A. That is right.

(Testimony of Freeman Schultz.)

(Whereupon, the jury was duly admonished and the trial was adjourned until ten o'clock a.m. May 9, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the witness Freeman Schultz resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows:)

Mr. Andersen: Could I interrupt just a moment? I assume from the way the case is going plaintiff is getting near the end. In order for us to plan, if counsel could give us an idea when he will get through——

Mr. Banfield: If the Court please, I think we will be fifteen or twenty minutes with Mr. Schultz, and then we have another witness dealing with damages and bookkeeping figures. I don't believe we will be very long.

The Court: Is that the rest of your witnesses?

Mr. Banfield: One or two short witnesses after that.

The Court: Counsel is not interested in how many but when you will get through.

Mr. Banfield: We have only two short witnesses after Mr. Boles and we expect to finish today. [665]

Q. Will you state your experience in the lumber business briefly?

A. I have been manager or assistant manager of mills since 1940. I have been superintendent of mills since 1930, and I had various work as labor

(Testimony of Freeman Schultz.)

foreman and other work like that from 1925 until 1930.

Q. In other words, you have an experience of about twenty-four years in the lumber business?

A. Plus working in summertime when I was going to school, going to college.

Q. How many mills have you actually managed?

A. I would say about ten, seven at one time—small mills.

Q. You testified last week regarding the repairs done at this mill in 1948. If the mill were operating in the regular fashion, when would repair work be done?

A. During the winter shut-down period.

Q. How long would that be each winter?

A. Two months at least.

Q. Would there be any repair or maintenance work done regularly through the other ten months?

A. Oh, yes. Ordinary maintenance and repair. Things need to be replaced as you go along.

Q. Is this repair program completed now?

A. At Juneau Spruce?

Q. Yes. [666] A. No.

Q. Would you give us a comparison of the amount of repair work which you did in the year 1948 as compared with what you would have done if the mill operated in 1948 and then had a shut-down last winter?

A. If we had been operating two shifts during

(Testimony of Freeman Schultz.)

the current year 1948, we would have spent more money on repairs than we have now, due to the fact that chains and machinery wear out and have to be replaced. We have a maintenance crew all the time that the mill is operating.

Q. Was this repair work done during the year 1948 done with a large or small crew? Tell us how many men were used on that job?

A. We have used eight to ten men. It will vary a little bit.

Q. When did that crew go on repair and maintenance work in 1948?

A. As soon as the mill shut down in October.

Q. It has been a repair job from October until now? A. That is right.

Q. How many would you normally employ in the wintertime for your annual overhaul?

A. Of course that would be a shorter season, two months. Approximately twenty-five to thirty men.

Q. Did you buy or install any new machinery during 1948? A. No new machinery. [667]

Q. Did you install any new equipment of any kind?

A. Some new chain and some new sprockets and as we have made some improvements in the mill we used all the old material we could find there and we had to buy some, a very normal sum.

Q. Mr. Schultz, do you know the market value of logs at Juneau during 1948? A. Yes.

(Testimony of Freeman Schultz.)

Q. What was the market value of logs during that period? A. $23 at Juneau.

Q. That would be delivered to Juneau?

A. No. The practice in the northern half of Southeastern Alaska is that the logs are purchased at the logger's camp and the towing is for the account of the mill.

Q. That is $23 at the logging camp?

A. That is right.

The Court: Is that a log, or what is the unit?

A. A thousand feet of logs, Forest Service scale.

Q. $23 per thousand board feet; is that it?

A. Yes.

Q. Last week, Mr. Schultz, you testified regarding your investigations as to the possibility of disposing of lumber during the summer and fall of 1948 and up to the present time, I believe, and I questioned you as to what investigations you had made for disposing of lumber [668] through British Columbia. Do you remember your testimony in that regard? A. I think I do.

Q. Are you still of the same opinion, that your testimony was correct at that time?

Mr. Andersen: I will object to that as simply calling for a conclusion.

The Court: As I interpret it, it is only preliminary. I expect there is some change in the testimony; otherwise, it is merely repetition.

A. I believe at that time I testified that we had only investigated the port of Prince Rupert in

(Testimony of Freeman Schultz.)

British Columbia, and actually we investigated Vancouver, too.

Mr. Andersen: I want to interpose my previous objection, too, that it was hearsay. The objection was that it was hearsay and the same objection now, may it please the Court. He refers to this investigation we discussed last Friday.

The Court: Objection overruled.

Q. Did you investigate the possibility of unloading at Vancouver? A. Yes.

Q. Why have you now remembered this when you did not know about it before?

A. Well, Vancouver has not been a desirable outlet from [669] previous reports. We didn't pay much attention to it. At this time now it is not available to us.

Q. Did you make an investigation as to whether it has been available since the strike?

A. Yes.

Q. What——

Mr. Andersen: I object. The same objection.

The Court: The thing is, if they could use it as an outlet, rather than if it is available.

A. I was told the longshoremen would not unload our barges.

Mr. Andersen: I object to that as hearsay.

The Court: Unless connected with one of the defendants it would be hearsay.

Mr. Banfield: It should be stricken.

The Court: It will be stricken then.

(Testimony of Freeman Schultz.)

Q. Do you know whether it could be used as a port through which you could ship lumber?

A. It could not be.

Mr. Andersen: I object.

The Court: Objection overruled.

A. The longshoremen would not unload the barges.

Mr. Andersen: I object. The same objection.

The Court: Objection sustained.

Q. I asked if you knew? A. Yes. [670]

Mr. Andersen: Obviously, if the Court please, the answer calls for hearsay.

The Court: Yes. The important thing is whether or not they could use that port or did use it, not so much what led him to that conclusion.

Q. Mr. Schultz, as the result of this picketing and the other actions of the Longshoremen's Unions which have been described here, if you should start up the mill now, would there be any damages ensue hereafter?

Mr. Andersen: I object to that as purely speculative.

The Court: I don't understand. Repeat the question.

Court Reporter: "Mr. Schultz, as the result of this picketing and the other actions of the Longshoremen's Unions which have been described here, if you should start up the mill now, would there be any damages ensue hereafter?"

The Court: I think you should direct his atten-

(Testimony of Freeman Schultz.)

tion to something specifically if you ask it in that form, rather than permitting the witness to——

Mr. Banfield: I will withdraw the question.

Q. Have your markets and customers been affected by this strike?

Mr. Andersen: Same objection—speculation, hearsay and opinion.

The Court: Objection overruled.

A. Yes. [671]

Q. Explain that.

A. We have lost our customers.

Mr. Andersen: I move that be stricken, may it please the Court, for reasons heretofore mentioned.

The Court: I think it is a matter of knowledge on his part. Objection overruled.

Q. Mr. Prawitz testified he acted as an agent, his company was a commission agent for the Juneau Spruce. Are they willing to continue that relationship? A. Yes.

Q. Dant & Russell bought some of your lumber in stock at prices agreeable to the Juneau Spruce Corporation, is that the arrangement in effect there? A. Right.

Mr. Andersen: That calls for a conclusion.

Q. In what way then are your markets affected?

A. The customers that they had have been supplied from other sources, and now we will have to go back and show the advantages of our lumber as compared to lumber they have been buying.

Q. Were your shipments through Dant & Russell miscellaneous or special orders?

(Testimony of Freeman Schultz.)

A. Special orders or cut to specifications.

Q. Have your retail yards in Anchorage and Fairbanks been affected? [672] A. Yes.

Q. In what way?

A. We have not been able to supply them with all the lumber that they could sell.

Q. Is that due to this strike?

A. That is right.

Q. Do you know how much business was lost?

Mr. Andersen: I assume my objection runs to this as speculative, hearsay and opinion?

The Court: Objection overruled.

Mr. Andersen: I don't want to make an objection each time. May this objection run?

The Court: The record may so show.

Q. Are there any other items of damage of that nature?

A. We have lost a lot of our key personnel that will necessarily have to be trained.

Mr. Andersen: It is not responsive. I move it be stricken.

Mr. Banfield: We think it is, your Honor, a proper question and a proper answer.

The Court: Yes. Objection overruled.

Q. Has the lumber which you have had on hand during 1948—I am now speaking of the lumber which you still have on hand—has that been affected by this strike? A. Yes. [673]

Q. In what way?

A. Some is bowed, cupped, twisted, shaked, stained.

(Testimony of Freeman Schultz.)

Q. What do you mean by "shaked"?

Mr. Andersen: I object to that. It is not within the allegations of the complaint.

The Court: I am looking at your complaint. Do you contend it is within the allegations of the complaint?

Mr. Banfield: I think we have to show what damages occurred and we will have to show just what damages we are claiming and what damages we are not claiming. This witness testified he is unable to ascertain the exact amount of damages, and our intention—we are not asking for specific damages.

Mr. Andersen: If he is not asking, it is immaterial.

The Court: I think so too. If you are not asking, there is no purpose in going into it then.

Mr. Banfield: We are differentiating. We are going to show—we are asking only for what is definite and certain.

The Court: If anybody wants to differentiate it, let the defense differentiate it, if they think it is too general, but on your case I don't think it is necessary to go into that.

Mr. Banfield: Is your Honor waiting for a question or have you ruled on that?

The Court: If that is the only purpose—— [674]

Mr. Banfield: That is the only purpose.

The Court: I think the objection will have to be sustained to it then.

Q. Mr. Schultz, would it be practical or possible

(Testimony of Freeman Schultz.)

for the Juneau Spruce Company to ship to any port beyond Puget Sound? A. No.

Q. Why is that?

Mr. Andersen: May it please the Court, I don't believe we are concerned here with probabilities or possible practicalities. It is completely immaterial.

The Court: I think it would be relevant on a question of mitigation. Objection overruled.

A. There is machinery and equipment in Puget Sound to finish our product. It leaves here in a green state. There is machinery there to finish that. If we use our own equipment to tow it someplace—it is not ocean-going equipment——

Q. Could you insure for ocean-going?

Mr. Andersen: That is not material here.

The Court: If it limits their markets and hence increases their damages it would be relevant.

Mr. Andersen: I don't see on what basis—if it could be insured, that it would have anything to do with this complaint. [675]

The Court: If it limits their markets, and it is relevant I think on the question of damages. Objection overruled.

Q. Is the clear spruce and the shop grade lumber shipped from Juneau a finished product?

A. Not when it leaves here.

Q. What must be done to it before it can be used?

A. It is cut to sizes suitable for making doors, cabinets—it is kilned and has to be dried before it can be used.

(Testimony of Freeman Schultz.)

Q. Could you dry it here and ship it down there?

A. Yes, we could dry it here and ship it down there, but wood has an affinity for water and we have to ship it, and then it would be useless and we would have to go through the process down there.

Q. To sell in the eastern markets, shop and clears have to go through a finishing process?

A. The same way.

Q. Is that done on the East Coast?

A. Not to a great extent. It is done some in the Mississippi Valley, but not very much.

Q. Now, the common grades that you have described, where can you sell those?

A. Most anyplace that a house is being built.

Q. Are they finished when they leave here?

A. Yes. [676]

Q. Ready for use then?

A. They are ready for use.

Q. Where would you ordinarily dispose of your common grades of lumber?

Mr. Andersen: I think this line of questioning also is immaterial, may it please the Court.

The Court: Objection overruled.

A. First to our retail yards in Alaska and then to the markets in Oregon and California.

Mr. Banfield: If the court please, I believe there was some discussion before as to whether it was relevant to show the plans of this Company in the commencement of the operation season in 1948. I

(Testimony of Freeman Schultz.)

am not speaking now of a long range plan and what they intended to do that year. It is our contention if they operated they would be entitled to damages. I would like to ask the witness a question on that. I think the Court, under slightly different circumstances, stated that plans, etc., were not admissible. I think I would like to show the intention for that first.

The Court: You mean beyond showing that you were going to operate in 1948?

Mr. Banfield: No, I intend to show they did intend to operate for 1948.

The Court: I don't think any ruling of mine excluded that. You may go into that. [677]

Mr. Andersen: I object.

Q. Do you know what the plans were for operating the plant in 1948? A. Yes.

Q. What plans did you have?

A. To cut all the lumber we could cut.

Q. How much did you figure you could and would cut?

A. In excess of fifty million.

Mr. Andersen: I object to that as a conclusion.

The Court: Objection overruled.

Q. That would be fifty million board feet?

A. Board feet.

Q. Could that have been done with the equipment which was installed there and in the condition in which it was installed there at the time you arrived here in 1948?

(Testimony of Freeman Schultz.)

Mr. Andersen: Same objection.

The Court: Objection overruled.

A. Yes.

Mr. Banfield: You may cross-examine.

Cross-Examination

By Mr. Andersen:

Q. I understand, Mr. Schultz, that you first came here in January, 1947, and then apparently moved up here in June of 1948? [678]

A. That is right.

Q. And I assume that between those two dates you weren't here. Were you in Portland?

A. No.

Q. Where were you between those two dates?

A. I lived in Coos Bay.

Q. At that time you were an employee of the Coos Bay Lumber Company, is that right?

A. That is right.

Q. Between those two dates you weren't here. I believe you testified that you put some money into this Company also?

A. That is right.

Q. Who are the principal stockholders of this Company?

A. Gene Card that testified here is a stockholder. Stanley Johnson is our mill foreman, is a stockholder. D. D. Dashney, Coos Bay Lumber Company; J. W. Forester; Jens Jorgenson; Arthur Christianson; E. M. Boley; Mr. Chaney, Coos Bay

(Testimony of Freeman Schultz.)

Lumber Company; Dant & Russell and Paul Murphy; that will cover it.

Q. I assume from what you say only two of you live here. The rest, I assume, live in Oregon someplace?

A. Practically all of them live in Oregon, most of them in Coos Bay—workers in the mill, the same as I do.

Q. Does Mr. Chaney live in Portland?

A. He lived in Portland. [679]

Q. When you came up in January, made a survey and found the mill to be not necessarily held together by haywire, but in bad shape——

A. That is right.

Q. Not necessarily haywire?

A. Some haywire, and one horse.

Q. In pretty bad shape?

A. Yes, that is right.

Q. You used the word "prudently" when you talked about the expenditure of money. You bought equipment and bought a tub and whatever you thought necessary in order to operate this business, is that right?

A. That is right.

Q. I assume you are the person who decided what was to be spent or made recommendations?

A. No, sir.

Q. Who did? A. Mr. Hawkins.

Q. Did you also?

A. As a member of the Board of Directors, those subjects came up.

(Testimony of Freeman Schultz.)

Q. I thought I understood you to say originally, you originally determined the policy of the Company with respect to expansion and equipment? I may be in error.

A. As I remember, I said I participated—I didn't actually [680] determine it.

Q. This is preliminary. Whatever was spent you agreed to it? Some couple hundred thousand dollars was spent?

A. Right; as the Board would know in Coos Bay of the business being done here.

Q. About how much money was spent?

A. On repairs?

Q. Repairs and improvements, to get rid of the haywire.

A. Approximately one million and a quarter dollars.

Q. Altogether? A. Altogether.

Q. And I understand from what you say your idea was to get into production?

A. On a steady sustained production.

Q. You, of course, didn't want to let the expenditure of any amount of money necessary for operating the mill to stand in the way of operating the mill? Any improvements you felt necessary you did? A. That is right.

Q. And any amount of money you felt necessary to spend so the mill would operate without trouble you spent?

A. Not necessarily any amount.

(Testimony of Freeman Schultz.)

Q. You mentioned over a million dollars?

A. That is right.

Q. With respect to all that money, doesn't what I say hold [681] true?

A. There were some strings attached. It was not just like water flowing.

Q. I don't like to throw money away. I would assume you are the same type of person?

A. We hollered about it.

Q. You didn't waste it?

A. We didn't waste it.

Q. You tried, as you said on direct examination—you tried to spend, not necessarily frugally, but certainly prudently?

A. That is right.

Q. And as you sized up the situation here, what you decided to try and do was do everything reasonable in relation to the situation as you saw it to get the mill into efficient operating order?

A. That is right.

Q. There is no qualification to that at all, is there? A. No; no qualification.

Q. That applied particularly to the physical improvement of the mill, did it not? A. Yes.

Q. And, of course, also applied or should have applied, to all other aspects of the lumber operation?

A. The plant site as well as the physical properties of the [682] mill.

Q. Personnel, logging camps——

A. That is right.

(Testimony of Freeman Schultz.)

Q. And even the green chain?

A. Even the green chain.

Q. And I think you used the word "reasonable" —I use the word "reasonable" in the sense that you certainly would not, as operating Manager of this mill, condone the unnecessary expenditure of money to do something not required, nor would you condone not spending some money which the mill should spend for a really efficient operation?

A. If within my knowledge; that is true.

Q. Of course, for efficient operation firms have to spend, at one time or another, spend a little more money than is cut out?

A. That is right.

Q. In the operation of big industry, and this is a big industry, isn't it? A. No.

Q. We will say it is a fair-sized mill.

A. That is right.

Q. And what I have said applies to that also—in the expenditure of money you certainly don't condone—that is the wasteful expenditure of money —but insist that anything [683] reasonable, so far as operation of the mill is concerned, be done. That is true, isn't it? A. That is right.

Q. From what you said I assume you sell a great deal of lumber on contracts?

A. I don't understand what you mean by "contracts."

Q. Don't you have orders?

A. Yes, definite orders.

(Testimony of Freeman Schultz.)

Q. Definite orders are, of course, contracts, aren't they?

A. I didn't understand what you meant by "contracts."

Q. Well, aren't they? A. Yes.

Q. If you get an order from Black mill for so many feet of lumber and an order from Gray mill for so many feet of lumber, do you ever interchange orders? Suppose Black mill says, "Sell that to Gray Mill"?

A. No. We will ship to Gray mill, but Gray mill will pay for it. There is no trading of lumber.

Q. The order from Black mill is shipped to Gray mill and Black mill says, "We will get the money from them and pay you." That is your understanding?

A. We will buy lumber. We will sell lumber. There is no trading in behind.

Q. What do you mean, "trading"?

A. We won't say to Gray mill, "We need one hundred thousand [684] feet at Anchorage and we will trade you for someplace else."

Q. Suppose you have an order from Black mill and Gray mill phones in and says, "It is o.k. with use to ship it to Black." Do you ever do that?

A. Yes.

Q. You spent quite a length of time improving the mill, didn't you? A. Yes.

Q. Over how long a period of time?

A. What period are you talking about?

(Testimony of Freeman Schultz.)

Q. The time you first came up.

A. There was no period of repairs at that time.

Q. When did you start to repair it?

A. After the mill shut down in the winter of 1947-1948.

Q. Did you do normal repairs?

A. Normal operating repairs, of course, as the mill was going along.

Q. I assume sometime in April you started doing more repairs and improvement?

A. I don't understand.

Q. It is safer to say you don't understand. When you came in January you found what we both characterized as a haywire mill.

A. Yes. [685]

Q. You appraised it?

A. And turned in a report.

Q. You appraised it as to value? A. No.

Q. What did you appraise?

A. As to the plant site, the type of machinery and equipment here.

Q. And you, in other words, made what would be called an operating survey rather than a purchase survey? A. That is right.

Q. Have you ever made a purchase survey?

A. No. I have made this same type of survey at least eight or ten times.

Q. An operating survey? A. Right.

Q. I mean a purchase survey—we will say inventory and machinery not site value. You didn't do that here? A. No.

(Testimony of Freeman Schultz.)

Q. Do you know if anybody did that, if anybody?

A. After I was up and looked it over Mr. Chaney was up and looked the property over and Mr. Dashney and Mr. Boley looked the property over.

Q. Did I understand Mr. Hawkins made a value survey? A. No.

Q. He didn't? [686] A. No.

Q. When was this corporation formed?

A. When the property was taken over.

Q. And that was sometime, probably the first of 1947?

A. That is right, formed for that purpose.

Q. It wasn't Mr. Hawkins who made a valuation survey of the property?

A. He didn't say how much was sawmill value and——

Q. It wasn't he who did it? A. No.

Q. One of these other gentlemen?

A. That is right. It was an accounting problem.

Q. How many meetings did you have altogether with the longshoremen here? A. One.

Q. That was when?

A. When Mr. Albright and Mr. Pearson came to my office.

Q. That is the only meeting you had?

A. That is the only meeting.

Q. That is the meeting where they went to you to negotiate a contract?

(Testimony of Freeman Schultz.)

A. That is right.

Q. And the meeting lasted a couple minutes or so?

A. No, I would say we were there about an hour or maybe longer.

Q. And you, of course, refused to negotiate with them at that [687] time?

A. I am not sure just what you mean by "negotiating." We talked.

Q. Let's not have any argument over that word. "Negotiate" isn't "arbitrate"; it isn't "conciliate." "Negotiate" means where they talk among themselves and try to reach an agreement between themselves, some ultimate aim or desire. You understood it when the longshoremen went down to talk to you? By the way, when was it?

A. I would say the middle of November, 1948.

Q. I had here in October.

A. It could be.

Q. In other words, they went down to talk to you about negotiating a contract with them, that is, Local 16, for the longshore work. Isn't that the essence of it? A. That was the purpose.

Q. That was the essence of it, and there was no negotiation; isn't that true, sir?

A. No; we negotiated. We talked. We didn't arrive at a conclusion.

Q. You took the position you had nothing to negotiate, isn't that true?

A. No. We suggested to them the Woodwork-

(Testimony of Freeman Schultz.)

ers and Longshoremen get together. They are the ones that had the disagreement.

Q. That meeting was when? [688]

A. 1948.

Q. You suggested they get together?

A. Yes.

Q. In October, 1948, you told the longshoremen, "Get together with the Woodworkers and whatever is agreeable with the Woodworkers is agreeable to us."

A. No. If they made a plan and that was agreeable, I would carry it on to headquarters.

Q. You suggested to the longshoremen, the Woodworkers not being present——

A. They were.

Q. The Woodworkers being present at the meeting, or having a representative there, that they hold a meeting among themselves and thereafter come back to you?

A. If they could get together.

Q. Implicit in that was that if they could get together it would be all right with you?

A. I would recommend to the Board of Directors of our Company.

Q. You would recommend to the Board, you would accept anything worked out between them?

A. Not anything.

Q. Any reasonable thing?

A. That is right.

Q. The word "reasonable" covers a lot. That was in your mind? [689] A. Yes.

(Testimony of Freeman Schultz.)

Q. That was the view of the mill as expressed by you in October of 1948?

A. That is right.

Q. Didn't you tell them in that meeting you would not negotiate with them at all about longshore work?

A. No, I didn't tell them that.

Q. Didn't you tell them at that time that it was sort of a necessary condition that they first get together with the I.W.A. before you would talk to them? A. That is right.

Mr. Andersen: That is all.

Redirect Examination

By Mr. Banfield:

Q. Mr. Schultz, is Mr. Hawkins also a stockholder? A. Yes.

Q. Mr. Schultz, Mr. Andersen asked you several questions at one time there, sort of stringing out his question, and ended up by asking you how much money you spent in getting rid of the "haywire." Your answer was a million and two hundred and fifty thousand dollars.

A. I didn't understand it, that it was entirely getting rid of the haywire.

Mr. Andersen: I didn't mean it in that way.

A. It was plant and equipment altogether.

Q. And purchase of logging equipment?

A. And improvements down at the plant.

Q. And purchase of land?

(Testimony of Freeman Schultz.)

A. And purchase of land. In one lump sum, as I understood his question.

Q. Do you know how much money the Company has in this Company now?

A. In excess of two million dollars.

Mr. Strayer: Your Honor please, counsel questioned Mr. Schultz regarding the trading of orders. We thought it was preliminary and didn't object. He didn't pursue it. If he claims anything for it I think we are entitled to know what it is so we can examine this witness further, otherwise it should be stricken.

Mr. Andersen: Well, if an objection to that line of questioning was in order, the objection should have been made at the time. There was no objection.

The Court: This isn't an objection to it. This is a motion to strike unless the materiality is shown.

Mr. Andersen: I think the materiality shows very clearly. I think he probably sees the same thing I do, I might so state to the Court.

Mr. Strayer: I see no materiality at all.

The Court: I am in the same state of mind as counsel. [691]

Mr. Andersen: I will tell your Honor the purpose. This is going to be an argument. I will state it very briefly, though I think it is unfair. Mr. Schultz, on the witness stand—I can't quote the record verbatim—but in substance he testified that sometimes he would have an order from Black Company and the lumber will be shipped to the

(Testimony of Freeman Schultz.)

Green Company. That is a contract, as he testified, and lumber ordered by Black Company and not Green Company, and Green and Black Company adjusted the payments themselves. That is what he testified to. If we change that to I.W.A. and Local 16 we have the same situation. They have a contract with Black Company to sell the lumber and he sends the lumber to the Green company. Earlier he testified they had a contract with I.W.A., which will be Black Company. Black Company said, "Let Green Company have it." Mr. Hawkins said that I.W.A. said, "Let Local 16 have it." What he can do with Black Company and White Company he can do with I.W.A. and Local 16. I brought that out simply as a parallel, your Honor.

The Court: The motion to strike is granted. That testimony is stricken.

(Witness excused.) [692]

MARC S. BOLES

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. State your name.

A. Marc S. Boles.

Q. What is your occupation?

A. I am accountant for the Juneau Spruce Corporation.

(Testimony of Marc S. Boles.)

Q. How long have you been employed by the Juneau Spruce Corporation?

A. Since April 1, 1948.

Q. And have you been stationed here at Juneau all that time?

A. I was employed on the first. I didn't arrive in Juneau until the sixteenth.

Q. What qualifications do you have for this position?

A. I am a graduate of the University of Idaho. I majored in accounting. Since that time I have been doing nothing but accounting work. I have passed the Certified Public Accountant's examination and I am a Certified Public Accountant for the State of Oregon.

Q. And how much practical experience do you have in bookkeeping and auditing?

A. Eight years.

Q. Do you have with you a financial statement of the Juneau [693] Spruce Corporation?

A. Yes, I do have.

Q. And for what period has that been prepared?

A. For the fiscal year ended March 31, 1949.

Q. What is the fiscal year of the corporation?

A. From April the first to March 31 the succeeding year.

Mr. Banfield: If the Court please, I would like to have this statement marked for identification.

The Court: You are not going to offer it?

Mr. Banfield: We will offer it by this witness

(Testimony of Marc S. Boles.)

later. It is just in order as we go along——

The Court: An exhibit is marked for identification only when it is intended to offer it by some other person.

Mr. Banfield: Then we won't.

Q. Mr. Boles, will you identify page one of that exhibit?

A. Page one is the balance sheet or assets side of the balance sheet of the Company. I have March 31 of 1949 and 1948.

Mr. Andersen: I would like to interpose my general objection as far as the International is concerned to the testimony of Mr. Schultz.

The Court: You may make such an objection. The ruling is the same.

Mr. Andersen: And to this witness' testimony, as far as the International is concerned, and plus the additional [694] objection that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Q. Mr. Boles, on this financial statement you have an item here of inventory "Logs in Booms." Will you tell us the basis of value of the logs?

A. Those logs are valued at $23 a thousand. If you look at page thirteen of this exhibit you will find a complete statement of the footage and of the valuation per thousand log scale feet.

Mr. Andersen: In the interest of time, I fail to see the materiality of going into all the assets of the Company. We have already had two wit-

(Testimony of Marc S. Boles.)

nesses testify to the Company—Mr. Schultz just testified to the assets of the Company. I don't see that they have to break it down.

The Court: It doesn't seem necessary to take it item by item.

Mr. Banfield: Only those concerning which there might be some question, in arriving at the value. In other words, if there is any discrepancy between the market value and the book value, we put them in and explain them, or it might be somewhat misleading. This whole balance sheet—not so particularly in this—but it will substantiate the profit and loss. We are not going over it item by item, but only those concerning which there might be some question.

Mr. Andersen: I don't see why they have to go over [695] the balance sheet. They have testified. This will consume a day.

Mr. Banfield: No, it wouldn't.

Mr. Andersen: If it is twenty minutes it is too much. I just said it is not material.

Mr. Banfield: The balance sheet is not, your Honor, but the profit and loss is. This is tied in together.

The Court: You have already shown what you claim the losses are that were incurred.

Mr. Banfield: I am sorry, your Honor. We haven't.

The Court: You haven't?

Mr. Banfield: No. In the opening statement

(Testimony of Marc S. Boles.)

we have stated what it would be. We haven't shown it.

The Court: There is no use going over item by item what the exhibit shows.

Mr. Banfield: No; I am not going to.

The Court: Make it as brief as possible. You may proceed.

Q. What is the basis of the value of the lumber listed in the inventories?

A. It is valued at market prices f.o.b. Juneau.

Q. What is the total investment of the Company as of March 31, 1949, as shown on this balance sheet?

Mr. Andersen: I object to that as incompetent, irrelevant, immaterial and he has already asked that. [696]

The Court: Objection overruled.

A. We had outstanding capital stock $1,450,000 in addition to which we had a bank loan the total of which was $760,000.

Q. What is the total assets as shown by this exhibit? A. $1,823,986.50.

Q. Now, is this balance sheet based on the entire operation of the Company or just the sawmill?

A. It is based on the entire operation.

Q. Would it include the items in the retail yards? A. It would.

Q. Will you identify page four A.

A. Page four A is the manufacturing and overhead cost summary of the Company for the year ended March 31, 1949.

(Testimony of Marc S. Boles.)

Q. And does that summary show the profit and loss of the sawmill operation at Juneau?

A. It does.

Q. And what is the amount of profit or loss for this period? A. $558,440.07 loss.

Q. Would there be a different profit and loss if you were to take into account your retail yards?

A. Yes, there would.

Q. Where is that reflected?

A. Page six of this exhibit, the profit and loss summary.

Q. And in what way would it differ? [697]

A. The retail yards of the Company made money during the last fiscal year. In order to consolidate our net profit or loss, the profits from retail yards are deducted from loss in the sawmill operation.

Q. What phase of the Company's activities are included in the profit and loss statement, Exhibit 4A, which shows a loss of five hundred and fifty eight thousand and some odd dollars?

A. The logging and sawmill operations of the Company, with the exception of the box factory.

Q. Do you have a separate exhibit showing the profit and loss of the operation of the box factory?

A. That is detailed on page five of this exhibit.

Q. I call your attention to Exhibit 3A and ask you—there is an item there stated as an expense for logging operations of towing rafts, $66,814.08. Will you explain what you mean there by towing rafts?

A. That is the expense incurred by our tow-

(Testimony of Marc S. Boles.)

boats as detailed on page 14F of this report for the last fiscal year.

Q. In other words, that is the total expense of operating the boats? A. That is correct.

Q. Does that include depreciation of them?

A. Yes.

Q. Not necessarily just the expense of towing rafts? [698] A. No.

Q. Had they been put to other use during this period?

A. We tried to find all the work we could to limit the loss as much as possible.

Q. Have you found other work for them?

A. Some.

Q. How much was received from the operation of the boats? A. $22,179.04.

Q. The next item on page 3, on this page, is Logging Depreciation, $59,600. Will you explain what this is?

A. That is depreciation on our equipment at the Edna Bay camp, yarders, caterpillars, road building equipment, fire fighting equipment and all other miscellaneous equipment at the logging camp, to operate efficiently.

Q. On the profit and loss statement as shown on page 4A and as shown on page 6, have you included the income from these boats as income of the sawmill operation?

A. It has been so included.

(Testimony of Marc S. Boles.)

Q. And you deducted the expense from the total income? A. True.

Q. And deducted depreciation from your income? A. That is true.

Q. This appears to be a statement which includes not only the year but the month of March. Can you explain that?

A. This is our usual financial statement which we prepare [699] each month for submission to the Board of Directors, and we use this final in each month to give the complete picture for the entire year.

Q. In other words, it shows everything during the month of March, and in addition, accumulation of everything for the year? A. Yes.

Q. One being in one column and the other being in the other column? A. Yes, sir.

Q. Now referring to page six of the financial statement you show here "Net Loss-Juneau Sawmill and Logging Camp-Above" $522,314 and some credits against that at the bottom of the page. Will you explain that?

A. We incurred certain expenditures during last winter which led to improvement. There were repairs to the sawmill from November 1 to March 31. We moved the big retail shed from the center of the yard, too, and built a fence completely around the property. We replaced rotten dock with rock fill, $27,493.55 having been eliminated from our recorded loss for the year.

(Testimony of Marc S. Boles.)

Q. Valuing that against the loss, what is the final resulting loss to the Company from its sawmill and box factory operation?

A. $524,821.37. [700]

Q. What standards have you used in the preparation of this financial statement, balance sheets, profit and loss statements, etc.?

A. It is prepared in accordance with generally accepted accounting and auditing principles and procedures and I used all the items and principles needed to properly present this statement.

Q. Turing to page seventeen—no, I am sorry, I got the wrong reference here—does this statement here reflect the actual loss of the Company for the period? A. It does.

Q. And what was included in income in preparing this profit and loss statement, what items did you include in the income?

A. All sales of the Company and other miscellaneous receipts as recorded through the year.

Q. I would like to have you answer that again and explain what sales.

A. I included all sales of the Company to outsiders, as well as transfers to our own retail yards, as income to the sawmill operation.

Q. You transferred to the retail yards at what value? How much would be charged to the retail yard and be credited to the account of the sawmill?

A. We charged our own retail yards the net sale price [701] we would realize on a sale to any other person.

(Testimony of Marc S. Boles.)

Q. And what in the income did you include besides sales?

A. A small amount of miscellaneous receipts from rentals of our houses in Douglas and from miscellaneous equipment which we rented, principally one yarder.

Q. In other words, your receipts consisted of sales and these miscellaneous amounts?

A. Right.

Q. An income from towing boats?

A. That was included.

Q. Generally speaking, what did your deductions from income consist of?

A. I am sorry, I don't follow your question.

Q. On your profit and loss statement you have shown expenes, deductions from income. What were the expenses, broadly speaking, as reflected in this statement? Does it consist of the operation of the sawmill or what does it consist of?

A. Are you referring to the deductions on page six?

Q. Yes; on page six, where you show the receipts of the Company, then you show expenses incurred which may lead to some amount of permanent improvement.

A. That was the expense which we incurred in making repairs to our sawmill from November 1, 1948, to March 31, 1949, the labor and material of which was $18,191.26. We moved [702] the big retail shed. That cost——

(Testimony of Marc S. Boles.)

Q. I am sorry, that isn't what I meant to get at. I mislead you there. Turning to page 3A and 4A, I want you to summarize for the Court and jury here just what these expenses consisted of that you have deducted from income in order to arrive at this loss.

A. Principally depreciation, insurance costs and the cost of maintaining watchmen and the cost of maintaining the men whom we—or whom we knew we had to keep if we ever hoped to get logging and sawmill operation going again.

Q. All the men who are working are included?

A. Yes.

Q. How many watchmen are there?

A. At present five.

Q. Does it include the logging camp expenses?

A. It does.

Q. Do you have to have personnel down there now? A. Yes.

Q. How many?

A. At the present time four men.

Q. What do they do?

A. Two men are there principally as watchmen. We have two men there now who are cleaning up our logging equipment, trying to repair the damages which the last year's idleness [703] has caused them.

Q. These watchmen—why do you have to have two watchmen there?

A. It is extremely dangerous to leave one man in an isolated spot. If something happened the other one could get help.

(Testimony of Marc S. Boles.)

Q. Do you have a time-clock punching system?

A. Not at the logging camp.

Q. Do you at the mill? A. We do.

Q. Do these expenses include the expense of operating the mill from July until October?

A. They do.

Q. Has the lumber or the money received from the sale of lumber produced last summer, has that been credited in this profit and loss statement?

A. It has.

Mr. Banfield: We will offer the financial statement in evidence, your Honor.

Mr. Andersen: The same objection, may it please the Court.

The Court: Objection overruled.

(Whereupon the exhibit was admitted and marked Plaintiff's Exhibit No. 14.)

Q. Mr. Boles, have you prepared anything to show the amount of profit and loss which the Company would have had, had [704] it operated this mill? A. I have.

Q. Do you—how many copies do you have here of that?

Mr. Andersen: Am I to understand there will be more testimony such as Mr. Prawitz gave?

Mr. Banfield: No.

Mr. Andersen: Isn't this the same exhibit?

Mr. Banfield: Mr. Prawitz testified to page seventeen of this exhibit and also one other witness testified regarding page eighteen.

(Testimony of Marc S. Boles.)

Q. Mr. Boles, for the purpose of the record here, will you briefly state what this document is that you now have and which we are discussing?

A. This exhibit is a complete statement of what the Company should have made had the Company been allowed to operate during the fiscal year April 1, 1948, to March 31, 1949.

Mr. Andersen: I move the answer be stricken, may it please the Court. This is a new line of questioning. I want to interpose the same objection. It is incompetent, irrelevant and immaterial, so far as the allegations of this complaint are concerned.

The Court: Objection overruled.

Q. In order that we can more logically follow your testimony later, Mr. Boles, will you state briefly how you went about the process of developing what this profit and loss [705] would have been if the Company had operated.

A. The first problems in the order in which they appear in this schedule——

Q. Excuse me. I believe if you started with seventeen and eighteen and then went back to No. one, I think it would be better.

Mr. Andersen: Regarding Exhibit seventeen which Mr. Prawitz testified about, I am going to object that it has been asked and answered. Unless Mr. Banfield tells me how many witnesses he is going to have——

Mr. Banfield: Mr. Prawitz testified on one question that was how much lumber would have been

(Testimony of Marc S. Boles.)

sold. This witness doesn't know anything about that.

Q. Will you explain page seventeen and eighteen.

A. Page seventeen and eighteen are the amount of production in terms of thousand board feet by grade, by description and by species which the Company would have had, had it have operated.

Q. How did you determine that?

Mr. Andersen: May it please the Court, I want to make another objection. This witness, as I understand, is allegedly testifying as an expert. He isn't on the selling end of this business. He is an accountant, and when he says "would have sold" I assume somebody told him they would have sold it. I don't want to accept this man's understanding, or [706] want him to testify on the figures, or I will have to be objecting to all of it as conclusions of the witness.

The Court: As keeper of the accounts, wouldn't he know.

Mr. Andersen: What was, but not what would have been sold.

Mr. Banfield: I am talking about species and grades.

Mr. Andersen: And what may have been sold, as I understood the question. May we have the Reporter read the question?

The Court: I understand that. There has been testimony in this case as to the amount of lumber

(Testimony of Marc S. Boles.)

that could have been produced and could have been sold. This witness is going to testify, as I understand it, to the breakdown.

Mr. Andersen: If he is just testifying to the breakdown——

The Court: Is the purpose to show anything else?

Mr. Banfield: If counsel will turn to page seventeen he will plainly see. If the Court please, this does not deal with volume, but with grades and how they are ascertained for any volume, if it is one hundred thousand or one hundred million. What I am asking the witness is how he determined in what grades the lumber produced would fall, regardless of the quantity.

The Court: Is it a breakdown of the lumber production? [707]

Mr. Banfield: Yes.

The Court: Objection overruled.

Mr. Andersen: Is the understanding that the witness can testify from figures but not what would have been done, so far as he personally is concerned?

The Court: That is what I understand.

Q. How did you arrive at these breakdowns, sizes, grades, species and quality typing of lumber?

A. We completely tallied or analyzed the lumber by grade, by species, by the type that was pulled from our sorting table during the month of August, 1948. Inasmuch as that lumber was pulled by shop, by clear, by common, in order to determine what

(Testimony of Marc S. Boles.)

classifications they would have fallen into within the major grades, we completely analyzed our shipments for the year 1947 and determined what percentage of each of these types of lumber would have been produced.

Q. On this page seventeen there appears here one row of percentages indicating that 15.54 per cent of your lumber would be spruce, 4.9 per cent would be hemlock, etc. Is that what was determined from the green chain pull?

A. That is correct.

Q. As indicated on the same page, it is shown that clear spruce, five by four by six and wider, vertical grain, B and better, would be 1.56 per cent, and the two by six and wider vertical grain, B and better clear spruce, would [708] be 5.14 per cent of the total spruce. Is that correct?

A. That is correct.

Q. And going on with the other sizes the same way? A. Yes, sir.

Q. Now what values did you assign to the production of each specific type of lumber? Where did you get your values to use in determining the value of the lumber produced in each one of these sizes and grades?

A. You mean total amounts?

Q. No. How did you determine at what price to sell rustic siding?

A. That information was furnished me by Mr. Prawitz.

(Testimony of Marc S. Boles.)

Q. If you will refer to page sixteen, which is a table of prices by grades as determined by Dant & Russell, I will ask you if you have one of those tables of prices before you?

A. There is one in this exhibit.

Q. I will show you here Plaintiff's Exhibit No. 13 marked for identification and ask you if that is the scale of lumber prices which you have used?

A. Those are the values we used in computing our total sales.

Q. Is that schedule introduced here marked for identification as Plaintiff's Exhibit 13, the same as this schedule which I have incorporated here in this full exhibit? A. It is. [709]

Mr. Banfield: If the Court please, for the purpose of this testimony here, I think this should be marked for identification, for identification in the record. What he has, Exhibit 13 for identification, is the same as page sixteen of this particular document.

The Court: If you are going to have him testify from more than one, you better.

Mr. Banfield: In this case there is a necessity which ordinarily doesn't exist.

The Court: Very well.

Mr. Banfield: I would like to have it marked for identification at this time.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit 15 for identification. Just one sheet or the whole exhibit?

(Testimony of Marc S. Boles.)

Mr. Banfield: The whole exhibit, the whole thing, the whole document.

Q. Mr. Boles, is the document which is marked for identification as Plaintiff's Exhibit No. 13 identical with page sixteen of the document marked for identification Plaintiff's Exhibit 15?

A. It is.

Q. Now, Mr. Boles, I would like to show you here two pages which are marked for identification as Plaintiff's Exhibit 10. Are those two pages identical with pages seventeen [710] and eighteen of the document marked for identification as Plaintiff's Exhibit No. 15? A. They are.

Q. Now, Mr. Boles, did you apply the values as shown on page sixteen of the document marked for identification as Plaintiff's Exhibit No. 15 in accordance with the production month by month?

A. I did.

Q. Of the plant. In other words, you mean to say if a certain item were produced in a certain quantity during the month of October, that you took the price off of that page sixteen and multiplied it by production and considered that the selling price? A. I did.

Q. Now on page eighteen there is set forth here a distribution of lumber by grades and by ports, that it would have been shipped through, apparently. Will you explain what that is?

A. It is the distribution of how the Company would have shipped its lumber to the various ports for sale.

(Testimony of Marc S. Boles.)

Q. Now, here under the Puget Sound ports you have shown a distribution of lumber in the amount of seven hundred and twenty seven thousand feet for the months April, May, June, July, August, but none in September, October, November, December, January or February. Why was that? [711]

A. There was a general waterfront tie-up.

Q. What do you mean by "general waterfront tie-up"?

A. The Unions operating for the steamship companies were on strike. There were no steamers in port and it was absolutely impossible to ship by steamer.

Q. You mean to say what you have done here is work out where this lumber would have gone to?

A. That is correct.

Q. What is the purpose of that?

A. So we could determine our transportation costs.

Q. And where do you find those transportation costs in this document marked Plaintiff's Exhibit No. 15 for identification?

A. On page two of that document.

Q. Going back to page one of the same document, could you tell us what the total sales would have been in dollars and cents for the fiscal year 1948-1949? A. $3,063,821.91.

Q. I didn't quite get that.

A. $3,063,821.91.

Q. I believe that is set forth on page one and two is it not? A. That is correct.

(Testimony of Marc S. Boles.)

Q. Of this exhibit. Now, how did you go about determining the expenses which would have been incurred in the operation [712] of the plant during the fiscal year 1948 and 1949?

A. By referring to past records of the Company I determined what number of men would have been needed to operate that plant, determined how much it would cost for that man on that job per shift—we had so many operable shifts per month—that would give me my total payroll. Our logs would have cost us, approximately would have cost us $23 a thousand.

Q. On the basis of what production has this document been prepared, production of lumber?

A. 38,268,000 board feet.

Q. Now, what would be the total log consumption necessary to produce that much lumber? Is that set forth on one of these sheets?

A. It isn't.

Q. Is it set forth in any manner whatsoever or in total?

A. Not as to the log scale feet that we would have used.

Q. How did you determine the amount of logs you would have converted into lumber?

A. The Company can get five per cent overrun in running logs. They would know the board feet would be the resultant difference, in terms of board feet plus five per cent as overrun and would deter-

(Testimony of Marc S. Boles.)

mine the amount of lumber of logs in terms of log scale feet, they would have to buy.

Q. What do you mean by "overrun"? [713]

A. By careful cutting, the Company is able to get more lumber out of a log than the integral amount of lumber of that log, as the logs are scaled on log scaling rules.

Q. The Forest Service scale, and that term is "log scale" and that is what you buy, and when you produce you get more lumber out of it than what there is to begin with? A. Correct.

Q. Why is that?

A. The scale rule—suppose you get out of a log in terms of lumber exactly what the log scale would show, providing you cut it into one inch lumber. Where you cut the log into two inch lumber you save kerf in the amount cut.

Q. That is where you get the extra production, is it?

A. Out of the saw kerf and out of the table. Logs are graded on the small end and on the diameter.

Q. The overrun comes out of the butt and the flare? A. That is correct.

Q. Did you ascertain what these logs would cost? A. I did.

Q. And what was the value?

A. $23 a thousand.

Q. Did you determine what the cost would be to deliver to Juneau? A. I did.

(Testimony of Marc S. Boles.)

Q. Where is that set forth? [714]

A. On page three of this exhibit.

Q. You have here various items such as for the boat "Santrina" operating labor, operating supplies, fuel and oil, galley supplies, repair supplies and expense, insurance and depreciation. How did you determine how much operating labor would be used?

A. By referring to page nine of this exhibit, I beg your pardon, it is page twelve, you will see how many men were needed to operate that boat, the amounts we paid that man for that month's work, the total of which is the amount it would have cost us for operating labor for that boat.

and weeks the boat would run?

A. These boats primarily were used to tow logs to the mill. It was necessary to operate those boats to bring enough logs in to operate the mill for that year. If there is no need for logs to satisfy our demand for this year, the boats could be tied up.

Q. Is that why you show less men aboard in December, January and February?

A. Correct, and the weather at that time also precludes towing of logs.

Q. And the sawmill, box factory, power house, machine shop, planing mill, shipping department, etc., did you go through [715] those in the same manner to determine how many men would be on each job. A. I did.

(Testimony of Marc S. Boles.)

Q. What did you use as a basis for determining that?

A. The past records of the Company.

Q. You would have some items of expense like office supplies? How did you determine how much office supplies you would use in a year?

A. In those cases where we were unable to determine the exact amount, we would use month by month—I checked the previous records of the Company and found what information I could and then would set the figure for that particular type of expense at the point where I knew the Company could not possibly exceed that cost. That would be the cost.

Q. How far did you go in increasing expense?

A. I generally doubled them from our previous records.

Q. Would your previous records be adequate to give a fair determination for this fiscal year 1948-1949? A. They were a guide.

Q. What do you find the total expenses of operation of the Company would have been for the fiscal year 1948-1949? A. $1,857,672.73.

Q. Would that include the expenses of operating the retail yards? [716] A. It would not.

Q. What items of expense would it include?

A. The operating or cost of the sawmill, logging costs, and the box factory.

Q. How about selling?

A. It includes selling.

(Testimony of Marc S. Boles.)

Q. The cost of selling? A. Yes, sir.

Q. Does this exhibit marked for identification as Plaintiff's Exhibit 15 reflect all the income which you would have had had the mill operated during that period? A. It does.

Q. How did you determine the number of shifts that would have been operated by the Company?

A. By the total number of days in the months which were operable.

Q. What do you mean, "operable"?

A. By eliminating Sundays and holidays, it gave us the number of shifts that we normally would have operated.

Q. How many shifts did you use?

A. Two, until March, 1949.

Q. For what period would this—what period did you use in preparing this?

A. The fiscal year April 1, 1948, to March 31, 1949.

Q. What period did you cut out for winter shutdown? [717]

A. The period of November 20 to the first of March, 1949.

Q. Mr. Boles, you show here that you have used the period April 1, 1948, to March 31, and the strike did not occur until April 10. Why did you use April 1?

A. It is practically impossible to segregate a statement for a short term period of ten days.

Q. Are the books kept on a daily basis or a monthly basis?

(Testimony of Marc S. Boles.)

A. They are kept on a monthly basis.

Q. You have the figures in your books down there as to production during the first ten days of April? A. I do.

Q. What would that production run in logs?

A. In terms of logs, about ninety seven thousand feet per shift.

Q. Do you know whether or not on a production of that amount under the expense the Company was at that time, whether or not a profit would have been derived?

A. There very definitely would have been.

Q. Has that profit been permitted to enter into your figures here as a part of the income of the Company? A. Yes.

Q. Have you included in these statements any damages for such items as the effect the strike had on your retail yards? A. I have not. [718]

Q. Or any losses of market? A. No.

Q. Anything of that nature? A. No, sir.

Q. How certain are you, Mr. Boles, that these expenses which you have listed here are not too small?

Mr. Andersen: That calls for obvious speculation on the part of the witness. How certain he is—that is a conclusion.

Mr. Banfield: If the Court please, in a case of this kind we have to prove——

The Court: Objection overruled.

A. In all cases where expenses are shown for

(Testimony of Marc S. Boles.)

this Company, there are far more—they are more than adequate to cover expenses the Company would have been put to in producing that lumber.

Q. You feel reasonably certain if you had operated your expenses would have been less than you show in Exhibit 15?

A. I am very certain.

Q. What would have been the net profit of the Company during the fiscal year April 1, 1948, to March 31, 1949, if the Company had operated and produced lumber and under the expenses which you have shown on this exhibit? A. $511,122.29.

Q. Now, Mr. Boles, have you examined the records of this [719] Company for the purpose of determining whether or not there were actually any members of the I.W.A. Local engaged in loading barges during the period April 1 to April 10, 1948?

A. I have.

Q. And how could you tell which men were members of I.W.A. and which were not?

A. We have the check-off list or the authorization from each of those employees for us to deduct from their wages and turn over to the Union the amount of their monthly dues.

Q. Their Union dues? A. Yes, sir.

Q. Were there many employees during the period April 1 to April 10, 1948, in the loading of Company barges with lumber who were members of Local I.W.A. M-271? A. There were.

Q. How many, do you know?

(Testimony of Marc S. Boles.)

A. Not off hand.

Q. What was it, to the best of your recollection?

A. About ten.

Q. Were there any more engaged in that work during that period who did not furnish you a check-off slip? A. Some, yes.

Q. Mr. Boles, referring to this exhibit marked for identification as Plaintiff's Exhibit No. 15, is this an accurate reflection of the amount of profit which would have been derived by the Company had it operated two shifts during the period indicated?

Mr. Andersen: The same objection, may it please the Court.

The Court: Objection overruled.

A. It is.

Q. Now, Mr. Boles, if you had prepared this statement for just the period April 10, 1948, to March 31, 1949, would it have shown the same amounts or greater or less than it shows now?

Mr. Andersen: I object.

The Court: Objection overruled.

A. It would have shown a smaller amount. Will you repeat your question, Mr. Banfield?

Q. If you had prepared Plaintiff's Exhibit No. 15 marked for identification on the basis of only April 10, 1948, to March 31, 1949, would it show more profit or less than what you have shown here?

A. It would show the same amount.

Q. You think it would show the same amount.

(Testimony of Marc S. Boles.)

Mr. Boles, Exhibit No. 14—has that been prepared for the whole fiscal year, April 1 to March 31?

A. It has.

Q. And if the exhibit marked Plaintiff's Exhibit 14 had been [721] prepared only for the period April 10, 1948, to March 31, 1949, would the loss of the Company in its operations have been any greater or any less by reason of leaving out those first ten days?

A. It would have shown more loss for the period.

Q. It would have shown more loss for the period if you had not included the first ten days in April?

A. It would have.

Q. In other words, you must assume vice versa, there was a profit during those ten days?

Mr. Andersen: Same objection.

The Court: I didn't get that.

Q. Do you assume there was a profit for the first ten days of April?

Mr. Andersen: The same objection.

The Court: I think the record, as it is now, speaks for itself.

Mr. Banfield: I think so also.

(Whereupon the jury was duly admonished and Court adjourned until 2 p.m. May 9, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the witness Marc S. Boles resumed the witness stand and the Direct Examination by Mr. Banfield was continued as follows: [722]

(Testimony of Marc S. Boles.)

Q. Mr. Boles, I asked you this question regarding Exhibit 14, now I would like to ask it regarding Exhibit 15: what standards of accounting did you use in preparing it?

A. All the standard accounting procedures and practices generally used by accountants under the same or similar circumstances.

Q. At the time you testified regarding the profit and loss statement for the fiscal year 1948-1949, we did not have it marked for identification. I would like to know if all your testimony which you gave regarding the balance sheet and profit and loss statement for that fiscal year is with reference to the document now marked Plaintiff's Exhibit 14?

A. It is.

Q. And was all your testimony with regard to the loss of profits given with reference to the document marked for identification as Plaintiff's Exhibit 15? A. It is.

Q. Now, Mr. Boles, did you have any conversations during last summer with the pickets down there at the plant? A. Quite often.

Q. Did you have any conversations with them regarding the departure of a barge of lumber?

A. I did.

Q. Will you state when that conversation took place? [723]

A. On August 26 or 27, 1948.

Q. And with whom did you talk?

A. With Joe Gaines and Pete Rasmusson.

(Testimony of Marc S. Boles.)

Q. And what were they doing at the time?

A. They were picketing the plant.

Q. Were they carrying signs?

A. They were.

Q. What did they state.

A. Pete Rasmusson asked me where the barge was going and I just ignored him. Pete said "We know a lot of places where that barge could go and we intend to know where it is going and we intend to follow that barge."

Q. Mr. Boles, with respect to the repair work which has been charged into the books and reflected on the exhibits, or Exhibits for identification marked 14 and 15, what practice do you follow with regard to what is repairs and what is not repairs when you make book entries?

A. All items which are not connected with the actual handling of the main products are called by us "repairs and maintenance."

Q. What do you mean by that?

A. A sweeper or an oiler in the plant would be classified as repairs.

Q. A sweeper?

A. A man who sweeps and pushes trash on the chain carrying it [724] to the burner.

Q. That would be repairs? A. Yes.

Q. Why repairs instead of labor?

A. It is purely arbitrary on our part, due to the fact that we want to know what our man hours are in handling the main product and what are not connected with handling the main product.

(Testimony of Marc S. Boles.)

Q. General maintenance includes floor sweepers and odd jobs like that? A. It does.

Q. You might say keeping the property in condition to use, is that correct? A. Correct.

Q. Can you tell us how much you actually charged into the repair accounts in 1948?

A. A total amount of repairs for 1948 and '49 include the cost of building the fence and moving the retail shed, $117,503.41.

Q. For the fiscal year 1948-1949?

A. Yes, that is for the fiscal year 1948-1949.

Q. In setting up your prospective profit and loss statement here, which is Exhibit 15, how much did you allow for repairs if you had been operating in the regular fashion? A. $187,736.61. [725]

Mr. Banfield: You may cross-examine.

Cross-Examination

By Mr. Andersen:

Q. Mr. Boles, as I understand it, all these figures to which you have testified, you received estimates, etc., you received from people in the operating branches of the business, is that true?

A. It isn't.

Q. Referring to Mr. Prawitz's testimony or some sheet he referred to, page seventeen, you saw that, didn't you? A. Yes, sir.

Q. What does that sheet purport to be?

A. That was furnished to me by Mr. Prawitz.

Q. What does that purport to be?

A. The sales price Dant & Russell could have sold our lumber at.

(Testimony of Marc S. Boles.)

Q. Sales price information received from other sources? A. Correct.

Q. That is what I said a moment ago, isn't that true?

A. If you will qualify your question, "Did you get your sales prices from outside" I will answer "Yes."

Q. That is all I referred to. Is that correct?

A. As far as sales prices.

Q. You got that information from Mr. Prawitz, is that true? [726] A. That is true.

Q. You didn't make any other check with respect to the figures from Mr. Prawitz?

A. No.

Q. You took those figures? A. Yes, sir.

Q. With respect to the information you got from Mr. Prawitz, all other information you used, I assume, you got from other men connected with the Company. Is that true? A. No, sir.

Q. Do you sell any lumber yourself?

A. No, sir.

Q. Do you work in the mill yourself?

A. No, sir.

Q. You just work in the accounting office of the Company here, is that correct? A. Yes, sir.

Q. Or is your office in Coos Bay?

A. Our office is here.

Q. You spent all your time in an office, isn't that true? A. Yes, sir.

Q. You don't have anything to do with the manu-

(Testimony of Marc S. Boles.)

facturing end of it at all? A. No, sir.

Q. You don't buy anything, do you? [727]

A. Yes, sir.

Q. Do you attend to purchases also?

A. To some extent.

Q. What do you buy?

A. Office supplies, also——

Q. What do the office supplies amount to in a year? A. They don't amount to anything.

Q. They don't amount to anything so you don't buy any? You don't manufacture and you don't buy, so didn't you get figures from people who were in the manufacturing or——

Mr. Banfield: I object to counsel's saying one thing and asking a question on another and when he was asked on the original question he started to say office supplies and he said they don't amount to anything. The witness did not have a chance to finish the answer and he was asked "isn't it a fact all your information was from somebody else?" The witness said "No" and then he cross-examines as if he got no information. He said he didn't get all his information. I don't think the Court should allow badgering of the witness.

The Court: He has latitude on cross-examination and is not bound by the exact statement. Objection overruled.

Q. Just go back on the one I asked, if you bought anything. You said yes, you bought office supplies. Isn't that true?

(Testimony of Marc S. Boles.)

A. I said for one thing I bought office supplies.

Q. For one thing you bought office supplies, and I asked what they amounted to and you said they didn't amount to anything, is that true?

A. Correct.

Q. Anything else?

A. I signed contracts for oil and gas for the Company.

Q. And that doesn't amount to anything?

A. On office supplies.

Q. That is your testimony, is that true?

A. Yes.

Q. What else do you buy?

A. I just said I signed contracts for oil and gas for the Company.

Q. Is that a momentous amount?

A. Quite a bit, fifteen thousand a year.

Q. Do you buy it, or does somebody else arrange for its purchase?

A. It is kind of a four-cornered deal in the office.

Q. You didn't exclusively handle the matter of buying gas and oil for the Company? A. Yes.

Q. You just signed the contracts? A. Yes.

Q. Somebody else arranged the purchase and you signed for it if it was a material matter? [729]

A. Correct.

Q. What else do you buy?

A. Off hand I would hesitate to say.

Q. With respect to all these figures then that have been mentioned here your source of information is somebody else, isn't that true?

(Testimony of Marc S. Boles.)

A. No, it isn't.

Q. What do you want the record to be?

A. I reviewed the previous records of the Company, and based on the previous records of the Company I made a forecast of the future.

Q. You made a forecast, what is called a professional guess—is that right? A. Yes.

Q. Now, I assume—by the way, when did you start to work on these figures?

A. Oh, about six weeks ago, with the exception of course of the regular accounting statement of the Company.

Q. Then I assume, you have had conferences with counsel? A. Yes, sir.

Q. And conferences with many other people?

A. Yes, sir.

Q. And you knew what you were getting these figures up for? A. Very definitely.

Q. In the interests of the Company? [730]

A. I work for the Company.

Q. You got them up in the interests of the Company, didn't you? A. Yes.

Q. Did you prepare these statements, these documents, in the same manner as you would prepare an income tax, calculation or report for the Company? A. Yes, sir.

Q. The same way? A. Yes, sir.

Q. The profits and loss in the same way as they are disclosed for income tax, as far as the Company is concerned? A. Yes, sir.

(Testimony of Marc S. Boles.)

Q. Again, for the interest of the Company—that is your primary interest here, is the interest of the Company, isn't that true?

A. Yes, sir.

Q. So to summarize this aspect of your testimony, you buy some small amount of supplies for the Company, you signed contracts when other people have arranged for the purchase of these commodities, and the rest of your testimony is a prognosis or guess or what the Company may have done in the future, barring all accidents and based on information from other people and the history of the operation of the Company? [731] A. No, sir.

Q. For how long?

A. One full year, the fiscal year May 1, 1947, ending March 31, 1948.

Q. How much of that time did the Company operate?

A. It operated the full mill up until late in November, the planing mill until January of 1948.

Q. You didn't take any figures subsequent to that fiscal year date?

A. Prior to that fiscal year date?

Q. Subequent to that fiscal year date.

A. Subsequent to that fiscal year date we were shut down.

Q. In this professional guess of possible profits, did you also include the time of the general strike on the Pacific Coast?

A. There was no necessity. We could still ship.

(Testimony of Marc S. Boles.)

Q. Did you include it or not?

A. Included.

Q. The ninety five day strike on the Pacific Coast, you are including that, aren't you?

A. Yes, sir.

Q. You included that period also in this itemization you made? A. Yes, sir.

Q. In other words, you included everything possible, didn't [732] you? A. Yes, sir.

Q. I understand, in a few instances you doubled estimates of expenses so you would be safe. Is that true? A. Yes, sir.

Q. During the period of the shut-down as you put it, key men were kept on the payroll?

A. Yes, sir.

Q. I guess that was wherever the plant operates, is that true?

A. I am sorry, I don't follow your question.

Q. You stated key men were kept on the payroll. Is that true? A. Yes, sir.

Q. Whether they did anything or not?

A. They were kept on, but they were kept busy.

Q. They were kept on the payroll?

A. Yes, sir.

Q. And if they were kept busy it was sort of making work? If you know——

A. I don't go through the plant every day. I am not sure of what every man in the plant was doing.

Q. You don't know? A. No.

(Testimony of Marc S. Boles.)

Q. Were men kept on the payroll at Juneau?

A. Yes.

Q. At the mill? A. Yes, sir.

Q. And other places where the mill operates?

A. The mill is only in Juneau.

Q. Other operations?

A. Our retail yards at Fairbanks and Anchorage were operating.

Q. You did keep key men on the payroll here?

A. Yes.

Q. A man named Flint—did you keep him in the manner which you have indicated?

A. Bill had been working for the Company.

Q. During the period I indicated?

A. Yes, sir.

Q. You considered him a key man, did you? You only kept key men, didn't you?

Mr. Strayer: The witness hasn't testified to that.

Mr. Andersen: I will withdraw it.

Q. You kept key men on the payroll, isn't that true? A. Yes, sir.

Q. And you kept Mr. Flint, is that true?

A. Yes, sir.

Q. And of course with respect to your profit and loss sheet there, page 4A of the report, and you refer to a loss of some five hundred-odd thousand dollars, loss of anticipated [734] profits?

A. Actual loss, sustained due to the shut-down.

Q. You didn't include a professional guess of profits? A. I did not.

(Testimony of Marc S. Boles.)

Q. You say just "actual loss"?

A. Yes, sir.

Q. In other words, the plant shut down for how long a period of time, according to your idea?

A. The plant was shut down on the morning of April 10, 1948.

Q. To July 19?

A. The plant got about half open on July 19.

Q. And shut down to what date?

A. October to the present time.

Q. The fiscal year—you have only gone to the end of the fiscal year? A. Yes, sir.

Q. And that would be March 31, if I recall correctly? A. Yes, sir.

Q. A period of some eight months, is that correct? A. Yes, sir.

Q. So by not operating your loss every month then, roughly in other words you lose $75,000 a month if you don't operate. Is that what I understand you to say? A. Approximately that.

Q. You lose $75,000 a month if you don't operate. Tell me [735] how you operate at a loss of $75,000 a month if you don't operate? Withdraw that, please. If you don't operate the plant you keep watchmen there, don't you? A. Yes, sir.

Q. And how much does that cost?

A. About $40 a week per man.

Q. And you pay taxes of course?

A. Yes, sir.

Q. Do you know what this corporation pays in taxes to the City of Juneau?

(Testimony of Marc S. Boles.)

A. I can look it up.

Q. Give me your estimate now, please.

A. About $7,200 a year.

Q. $7,200 a year in taxes to the City of Juneau. Well, when the plant is shut down you don't use any electricity to speak of, do you?

A. We use more. We are forced to buy more.

Q. You use more when shut down than when operating. A. No.

Q. When?

A. I say, we are forced to buy more. Ordinarily we generate our own.

Q. How much does your electrical bill amount to when you are shut down?

A. Between five and six hundred dollars. [736]

Q. A year or month? A. A month.

Q. When you are shut down?

A. Yes, We have to keep the motors and all the equipment warm.

Q. Four or five hundred dollars a month for electricity? A. Yes, sir.

Q. What other expenses do you have?

A. We keep the roof in repair and the dock in repair.

Q. Incidentals?

A. Depreciation expense, insurance——

Q. Depreciation expense is a bookkeeping item. I am talking about money that is actually spent.

A. Depreciation is just as much an expense. This equipment wears out.

(Testimony of Marc S. Boles.)

Q. Correct. It is an accounting item.

A. It rusts and goes to pieces.

Q. True. It was shut down three months. Did you write a lot of money off in depreciation from April through July?

A. It depreciates just as fast in this weather when it is sitting as when it is running.

Q. You included it as a loss in this?

A. Yes, certainly.

Q. How much did you include in here for depreciation of your plant during that shut-down period? [737]

A. This equipment depreciated about $125,000.

Q. In this short period of time you put down a depreciation figure of $125,000?

A. Yes, sir.

Q. This is what you call good bookkeeping practice? A. It is good accounting practice.

Q. I assume this charge of $125,000 depreciation was made pursuant to this good bookkeeping practice you talk about? A. Yes, sir.

Mr. Andersen: That is all, sir. Thank you. I am sorry, I have one further question.

Q. When did you have the conversation with these two men in front of the plant?

A. In the evening when we were loading the barge. I stopped to razz them.

Q. You stopped to razz them?

A. Yes, certainly. They had to work overtime that night.

(Testimony of Marc S. Boles.)

Mr. Andersen: Thank you. That is all.

Redirect-Examination

By Mr. Banfield:

Q. The $125,000 depreciation was over what period?

A. The entire fiscal year, April 1, 1948, to March 31, 1949.

Mr. Banfield: That is all.

(Witness excused.) [738]

JAMES FREDERICK CHURCH

(Whereupon James Frederick Church was called as a witness on behalf of the plaintiff and was duly sworn; respective counsel made statements to the Court with reference to the testimony to be elicited from the witness, and the witness thereafter testified; respective counsel thereafter made further statements to the Court; (the order for this transcript excluded the verbatim transcript of this portion of the record); whereupon the following took place:)

The Court: Let the record show that the stipulation is that the I.L.W.U. is a labor organization as within the meaning of the Taft-Hartley Act. The testimony of the witness will therefore be stricken as having been superseded by the stipulation and the jury is instructed to disregard it.

(Witness excused.)

TREVOR DAVIS

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-Examination

By Mr. Banfield:

Q. Will you state your name, please.

A. Trevor Davis.

Q. What is your occupation?

A. Photographer.

Q. Have you been engaged in that business in Juneau for the past two years? [739]

A. Yes, sir.

Q. Mr. Davis, did you take any pictures of the Juneau Spruce Corporation?

Mr. Andersen: Show us the pictures and maybe we will stipulate.

Mr. Banfield: We would like to stipulate that these photographs were taken in the latter part of October, 1947—— A. 1948.

Mr. Banfield: 1948, I am sorry, and that they show lumber piled on the Juneau Spruce Corporation dock. We offer them for the purpose of showing the condition of the property at that time, particularly how the place was clogged up with lumber.

Mr. Andersen: We will stipulate that the pictures show that.

The Court: Let the record show the stipulation.

(Whereupon the four photographs were admitted and marked Plaintiff's Exhibit No. 16.)

(Witness excused.)

DOROTHY PEGUES

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-Examination

By Mr. Banfield:

Q. Will you state your name please. [740]

A. Dorothy Pegues.

Q. What is your occupation?

A. Editor and publisher of the Alaska Sunday Press.

Q. Is that published at Juneau? A. Yes.

Q. Do you also do writing and reporting on the paper? A. Yes, I do.

Q. Tell me, did you ever interview Mr. Vern Albright regarding the dispute between the Juneau Spruce Corporation and the longshoremen at Juneau? A. Yes, I did.

Q. Will you tell us the first instance of this briefly, what happened, when and where?

A. I believe the first time I actually interviewed him was in my office. It was back in June——

Q. Of what year?

A. This last, past June, of 1948.

Mr. Andersen: Did you say June, madam?

A. Yes.

Q. How did it happen you had this interview at that time?

A. At that time the dispute—the story at that time was about the progress Mayor Hendrickson had made in an effort to settle the dispute between

(Testimony of Dorothy Pegues.)

the longshoremen and the Juneau Spruce Corporation——

Mr. Andersen: I am sorry, I didn't hear you.

A. Between the longshoremen and the Juneau Spruce Corporation.

Mr. Andersen: You said something about settling something?

A. Yes, Mayor Hendrickson made an effort to settle the dispute.

Q. Did Mr. Albright give you a statement at that time?

A. Yes, he did. He came into my office and we talked about it and then he dictated a statement and I took it on the typewriter.

Q. Was that statement published in the paper as he gave it to you? A. Yes, it was.

Q. I will hand you page eight of the Alaska Sunday Press June 6, 1948, and ask you if this contains the statement made by Mr. Albright?

Mr. Andersen: I assume my same objection regarding the International will run?

A. Yes, that is the statement he gave me.

Q. Was there anyone with him at that time?

A. I don't recall. I believe there were several men came in at different times.

Q. Who did the talking A. Mr. Albright.

(Whereupon counsel for plaintiff handed the newspaper to Mr. Andersen.) [742]

Mr. Andersen: It is rather contemptuous to be

(Testimony of Dorothy Pegues.)

reading a newspaper in the courtroom, your Honor.

Mr. Banfield: It will be all right under the circumstances, I am sure. If the Court please I would like to offer this in evidence as a statement by Mr. Albright. The part we offer is for the purpose of showing his quotation on page eight.

The Court: If there is no objection it may be admitted.

(Whereupon the newspaper was submitted and marked Plaintiff's Exhibit No. 17.)

Q. Was Mr. Albright ever in your office again after that? A. Yes, he was.

Q. For what purpose?

A. To give us an interview regarding the longshoremen's strike.

Q. Did he dictate a statement?

A. Yes, on one occasion.

Q. How did you take it down?

A. On the typewriter.

Q. Do you know when that was?

A. On the second occasion?

Q. Yes.

A. It was for our July 4 issue. As I recall, it was the day before. I am not positive. [743]

Q. Who was with him?

A. He came with Mr. Wukich, who was at that time President of the Union.

Mr. Andersen: That is, of Local 16.

A. That is right.

(Testimony of Dorothy Pegues.)

Q. I will hand you here a statement or a sheet of paper and ask you if that is what you took down on the typewriter at that time?

A. Yes, that is it.

Q. Now, underneath this typed part there are a few written words "declared in a signed statement." How do those happen to be on there?

A. I asked him to sign the statement.

Q. You asked him to sign it?

A. I told Mr. Albright I wanted the statement signed.

Q. Did he sign it?

A. No. He told Mr. Wukich to sign it.

Q. Did Mr. Wukich sign it?

A. Yes, he did.

Mr. Banfield: I offer the statement in evidence, your Honor.

The Court: If there is no objection it may be admitted.

Mr. Andersen: I object as far as the International is concerned, of course. [744]

(Whereupon the exhibit was admitted and marked Plaintiff's Exhibit No. 18.)

Mr. Banfield: You may cross-examine.

The Court: Are you going to read these in evidence?

Mr. Banfield: If the Court please, I could read them.

The Court: You have to do it while the witness is on the stand.

(Testimony of Dorothy Pegues.)

Mr. Banfield: That is right.

Mr. Andersen: I won't make any point of that, your Honor .

Mr. Banfield: I desire, however, to read a portion of the statement here. "Mr. Albright made the following statement: 'The publishing of Mayor Hendrickson's Return to Work Proposal has the appearance of an employer inspired publicity dodge, the purpose of which is to shift the blame of the existing dispute between the Corporation and the Longshoremen from the shoulders of the Corporation to that of the Longshoremen. The meaning and intent of the Mayor's proposal appears innocuous to most persons unacquainted with the facts governing this dispute. It would result in Juneau longshoremen losing a great deal of their work for all time, establishing a dangerous precedent which in all probability would cause the spread of the dispute to all mill towns in Southeast Alaska.

"It also is a subterfuge by which the employer is enabled to avoid bargaining collectively with employees who have performed this work in Juneau for a number of years past. At no time during the existing dispute have the longshoremen refused to meet or bargain with the Mill Corporation. The Corporation has consistently refused to bargain with the longshoremen. [745] Such bargaining would, without a doubt result in resolving this dispute in a few hours.' " The other exhibit reads as follows: "Picket line remains. The I.L.WU. picket

(Testimony of Dorothy Pegues.)

line established April 10 is still being maintained and according to a statement made yesterday by officials of the Union, will be continued until such time as a satisfactory agreement to the Union is reached. 'Until a satisfactory agreement is reached in the dispute of the I.L.W.U. No. 16 with the Juneau Spruce Corporation, the Union will consider the crossing of its picket lines as strike-breaking.' Anthony Wukich, Union President, declared in a signed statement. Signed Anthony Wukich.''

Cross-Examination

By Mr. Andersen:

Q. I assume, Mrs. Pegues, during the course of the strike you wrote many articles?

A. Several.

Q. Several? A. Yes.

Q. How often does your newspaper come out?

A. Once a week.

Q. Didn't you have an article every week?

A. I don't believe so.

Q. You wrote many articles? [746]

A. It would be from April the tenth.

Q. Until the present time?

A. Yes, off and on.

Q. So you wrote plenty of articles?

A. How many do you mean by many? Maybe one week and not for another week?

Q. I asked if there was one every issue?

(Testimony of Dorothy Pegues.)

A. No, I didn't. I didn't have a story in every issue, I don't believe.

Q. You may have missed one, or every other one? It was going on for months, so really you have written many stories about it?

A. I don't know what you call many.

Q. Did you only talk to Mr. Albright on the two occasions?

A. One or two other times he came in with other people. We didn't talk much.

Q. Other people? Local 16 and Mr. Albright, and you talked to them?

A. As a matter of fact, I don't believe I talked to any of the other local longshoremen at any time.

Q. Except Mr. Wukich?

A. He was with Mr. Albright.

Q. You talked to both of them?

A. When they were together.

Q. You haven't talked to any other longshoremen about it? [747]

A. I don't believe so.

Q. Did you interview the Company from time to time?

A. Very seldom. About two or three times.

Q. You interviewed this Union how many times?

A. When they came into the office.

Q. Where did you interview the Company?

A. Over the telephone. I called them up, and one time I went down.

Q. In other words, you would phone the Com-

(Testimony of Dorothy Pegues.)

pany or go to the plant to interview them and you would wait for the longshoremen to come in?

A. No. I called them—I called Mr. Albright for a statement. They were more difficult to contact.

Q. When did you call Mr. Albright? Was that with relation to one of these articles?

A. Yes, I believe that first one, the story of June 6.

Q. The newspaper account? A. Yes.

Q. With particular reference to this other one, with particular reference to this Exhibit 18, which is the plaintiff's exhibit, I guess Mr. Albright talked to you at this time in substantially the same manner as he talked to you other times?

A. Yes. He came in to make a statement.

Q. It had relation to the same situation? That is, this [748] labor matter?

A. The picket line.

Q. And it was the same general situation?

A. It depended on what he was talking about. It was about this jurisdictional trouble.

Q. He might say different words to you each time but it related to this difficulty at the mill, isn't that true?

A. Different aspects of the case, as it went along.

Q. When he came in to you this time, this exhibit in my hand—you don't want to read it again?

A. No.

(Testimony of Dorothy Pegues.)

Q. He came in to you on or about the third of July and he came with Mr. Wukich, the President of Local 16. Is that true?

A. At that time, yes.

Q. He came to sign it and he said he couldn't?

A. He just said to Wukich "Sign it." He just said "Sign it, Wukich."

Q. Wasn't there any other discussion about it?

A. About why he should sign it?

Q. Did you ask Mr. Albright to sign it?

A. Yes.

Q. He didn't, and he had Mr. Wukich sign it?

A. That is right.

Q. Did you have any discussion about it? [749]

A. Yes.

Q. He and Mr. Wukich were there alone?

A. Yes, just the two of them, as I recall.

Q. The day before you went to press?

A. I believe it was on Saturday.

Q. July 3, as I understand your testimony?

A. Saturday, I am not positive.

Q. How long were they there before this was typed up?

A. I should say probably ten minutes. I don't know the exact time.

Q. Did you talk generally about the trouble at the mill?

A. Not too much. They were in a hurry and it was our busy day.

Q. He made the statement and out they went, is that correct? A. Yes.

(Testimony of Dorothy Pegues.)

Q. You didn't mention Mr. Albright's name in this statement?

A. No, not in this. It might be in some other part of the story.

Q. This is just one portion of the story?

A. That is right.

Mr. Andersen: Thank you.

Mr. Banfield: Thank you.

(Witness excused.) [750]

LUDWIG C. BAGGEN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. State your name, please.

A. Ludwig C. Baggen.

Q. Mr. Baggen, what is your occupation?

A. I run a tugboat.

Q. What is the name of the boat?

A. "Santrina."

Q. Who owns the boat?

A. Juneau Spruce Corporation.

Q. How long have you been master of this boat for this Company?

A. I have been master of this boat ever since this Company has had it.

Q. Were you the master of the boat during August, 1948? A. Yes.

(Testimony of Luwig C. Baggen.)

Q. Did you take the vessel to Prince Rupert at that time? A. I did.

Q. And do you remember what the date was that you were in Prince Rupert? What dates you were there with the "Santrina"?

A. I couldn't remember off hand.

Q. I will ask you, Mr. Baggen, if you care to refresh your [751] memory from the log book of the "Santrina." Do you know what dates you were in Prince Rupert?

A. What date I was in Prince Rupert?

Q. Yes.

A. I arrived in Prince Rupert on August 30.

Q. And how long was the boat there?

A. Till September the third.

Q. What was the purpose of going to Prince Rupert at that time?

A. I was towing a barge load of lumber.

Q. You were towing a barge load of lumber?

A. I was towing a barge load of lumber, yes.

Q. Was it lumber of the Juneau Spruce Corporation? A. It was.

Q. Where was it supposed to be unloaded?

A. At Prince Rupert.

Q. While you were in Prince Rupert on this occasion—I will withdraw that. Do you know Mr. Vern Albright when you see him? A. I do.

Q. While you were in Prince Rupert did you see Mr. Albright? A. I did.

Q. Was anyone with him? A. Yes.

(Testimony of Luwig C. Baggen.)

Q. Who was with him? [752]

A. Joe Guy.

Q. And how many days were you there?

A. Well, I was there from August 30 until September 3.

Q. How many times did you see them there?

Mr. Andersen: By the way, your Honor, the same objection on behalf of the International.

The Court: Very well.

Q. Do you know how many times you saw them, Mr. Baggen?

A. I couldn't say. I would say I seen them three or four times at least.

Q. Was the barge unloaded at Prince Rupert?

A. No.

Q. Where did you go from there?

A. Tacoma.

Mr. Banfield: That is all. You may cross-examine.

Mr. Andersen: No questions.

Mr. Banfield: That is all.

(Witness excused.)

Mr. Banfield: If the Court please, we would like to have about a five minute recess at this time —ten minute recess, if the Court please.

The Court: Very well. Is this your last witness?

Mr. Banfield: Yes, your Honor. We think it will be the last witness. We want to examine some exhibits marked for identification. [753]

Mr. Strayer: Before the recess, your Honor, is counsel going to produce the records of Local 16 or ascertain if he could produce any information yet?

Mr. Andersen: We are unable to find the matter to which you refer.

Mr. Strayer: May the record show that then. Mr. Andersen, will you make a statement for the record that you made a search and were unable to locate the records?

Mr. Andersen: Of the kind to which you refer.

Mr. Strayer: Of Local 16?

Mr. Andersen: Yes.

(Whereupon Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Strayer: If the Court please, that completes the plaintiff's case with the exception of certain exhibits we wish to offer in evidence. We offer in evidence Plaintiff's Exhibit 3 for identification, stipulated to be the Constitution of the International Longshoremen's & Warehousemen's Union.

The Court: It may be admitted.

Mr. Strayer: Also we wish to offer in evidence Plaintiff's Exhibit 4 for identification, which is stipulated as the Constitution and By Laws of Local 16, I.L.W.U. [754]

The Court: It may be admitted.

Clerk of Court: The first one has been marked

Plaintiff's Exhibit No. 3 and this one has been marked Plaintiff's Exhibit No. 4.

Mr. Strayer: We offer in evidence the instrument, the Plaintiff's Exhibit 5 for identification, which is a copy of a letter dated October 18, 1947, which has been referred to in the testimony.

Mr. Andersen: May I see that?

Mr. Strayer: I will state for the record, your Honor, that when Mr. Schmidt was on the stand and being cross-examined by counsel for the defendant, he was testifying about a letter which he wrote to Mr. Hawkins, and Mr. Andersen objected, that the letter was the best evidence, and this copy of the letter was produced. We offer it as the best evidence of that portion of the testimony.

The Court: It may be admitted.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 5.

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial. I didn't make the best evidence objection, but also it is self-serving.

Mr. Strayer: I don't claim anything for the letter except it was referred to in the testimony of Mr. Schmidt. We offer Plaintiff's Exhibit 10 for identification which was [755] referred to by the witness Schmidt, and also by the witness Boles.

Mr. Andersen: The same objection, may it please the Court.

The Court: The same ruling.

Clerk of Court: The exhibit has been marked the Plaintiff's Exhibit No. 10.

Mr. Strayer: We offer in evidence Plaintiff's Exhibit 13 for identification. This sheet referred to by the witness Boles and also by the witness Prawitz.

Mr. Andersen: The same objection.

The Court: It may be admitted.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit 13.

Mr. Strayer: We offer in evidence Plaintiff's Exhibit 15 for identification which is the statement of profit and loss testified to by the witness Boles.

Mr. Andersen: The same objection, your Honor.

The Court: Was all of that testified to by the witness?

Mr. Andersen: I believe it was, your Honor.

Mr. Banfield: The testimony was that these extra sheets were explanatory and details of the profit and loss statement.

The Court: Explanatory of the witness's testimony? [756]

Mr. Banfield: And of the original profit and loss statement to which he testified, and supporting it.

The Court: In other words, it is just merely the breakdown of the figures to which he testified.

Mr. Banfield: That is right.

The Court: It may be admitted.

(Whereupon the exhibit was marked Plaintiff's Exhibit No. 15.)

Mr. Strayer: We offer from the original plead-

ing file the Special Appearance by Motion to Quash Service of Summons by the International Longshoremen's and Warehousemen's Union together with the Affidavit of Vern Albright attached and made a part thereof.

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial in this proceeding.

The Court: Whose affidavit?

Mr. Strayer: Vern Albright, for the purpose of showing the interest of the International.

Mr. Andersen: The same objection—incompetent, irrelevant and immaterial.

The Court: The objection is overruled. It may be received.

Mr. Strayer: May we separate that from the original pleading file? I believe you have the original pleading file.

Mr. Andersen: With respect to the last exhibit, [757] counsel states that he offers it in evidence. There can be no qualification. If it goes into evidence it is not for any limited purpose.

The Court: If he offered it generally for introduction into evidence that seems to strip it of any conditions or qualifications.

Mr. Andersen: Why don't you have a copy of it made?

Mr. Strayer: I think that would be much more satisfactory, if it is satisfactory with the Court.

Mr. Andersen: I will stipulate a copy may be used without giving up my objection.

Mr. Strayer: What number will that be?

Clerk of Court: Number 19.

Mr. Banfield: If the Court please, I think we have one right here.

Mr. Andersen: Are you offering this also?

Mr. Strayer: Yes. That is the document.

Mr. Andersen: We make the same objection, plus that it is hearsay, that it is incompetent, irrelevant and immaterial and hearsay.

The Court: Will you let me see it? I want to see what the hearsay consists of. It may be admitted.

(Whereupon the exhibit was marked Plaintiff's Exhibit No. 19.)

Mr. Strayer: Now, if the Court please, the Plaintiff [758] offers in evidence a certified copy, an authenticated copy by the National Labor Relations Board, in the matter of the International Longshoremen's and Warehousemen's Union, Local No. 16, C.I.O., and the Juneau Spruce Corporation, of the Decision and Determination of Dispute in March, 1949.

Mr. Andersen: I object to that as incompetent, irrelevant, immaterial and hearsay.

Mr. Strayer: I may say this document is offered solely for the purpose of showing a lack of certification of Local 16 which appears as part of our case.

The Court: It may be received for that purpose.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 20.

Mr. Strayer: We rest, your Honor.

Mr. Andersen: I should like to suggest to the

Court—it is now quarter of four—adjourning to the morning, and probably we can more expeditiously present our case, and I will inform the Court we think our case will take not more than two days and I am allowing for cross-examination.

The Court: I want to conclude the case this week if possible.

Mr. Andersen: I, too. I think we can save time. I have a motion also.

The Court: Perhaps you should make the motion today.

Mr. Andersen: Yes, your Honor. [759]

(Whereupon the jury was excused until ten o'clock a.m. May 10, 1949, and retired from the courtroom.)

Mr. Strayer: I neglected to ask your Honor, I am not familiar with the practice here, I understand the reading of various exhibits may be reserved until the time of argument?

The Court: I doubt whether, under our practice, it can be read at the time of argument, if it is not read while the witness is on the stand.

Mr. Strayer: The witness was not on the stand when the Constitution was introduced.

The Court: Under a stipulation the rule wouldn't apply.

Mr. Strayer: And the same thing would apply on the Board's decision.

Mr. Andersen: The motion I intend to make at this time, particularly on behalf of the International,

may it please the Court, is for an advised or whatever term is used here, advised or a directed verdict, may it please the Court. The point is simply stated and clearly set forth in Plaintiff's Exhibit 19 there, namely that, as I understand the Taft-Hartley Act, it simply in so far as agency is concerned—and I assume the Court sees the point I am making—it is a common law rule in essence of course, is that if I go down to buy an automobile as I said the other day for Judge Folta [760] before they can hold Judge Folta for it they must have more than my word. There must be something on behalf of Judge Folta before Judge Folta can be forced to pay for that automobile. Here there is not a single piece of evidence at this time, so far as the International is concerned, saving and excepting evidence of alleged agents, as to the extent of anybody's authority to bind the International or showing that anybody would have authority to bind the International in relation to anything that occurred. As a matter of fact the evidence is crystal clear that until long after the dispute arose the International wasn't even here. I direct your Honor's attention to the pleading, April 10 as the effective day. The undisputed evidence is that Vern Albright wasn't here until May 8, roughly six weeks after. So far as Mr. Bulcke is concerned, he was here only on one occasion, and there was no labor dispute of any kind, simply a little grievance that apparently was lost in the wash, so to speak. Then counsel have introduced in evidence Exhibit 19.

They have introduced it in evidence. I assume there is the same common law rule here as over all the country. When they offer it they vouch for it. There is no dispute about that principle, so in Exhibit 19 these gentlemen say that Mr. Albright had no authority of any kind to bind the International. That is what they say when they introduce this exhibit in evidence. They say Mr. Albright said he has no authority to bind the International in anything, that his sole [761] duties are to render aid—I am paraphrasing, your Honor will look through it—and advice to the Local, and has no authority to bind the International in any situation of this kind. That is the gist of what he said.

The Court: I think counsel is offering that for its admission.

Mr. Andersen: I made the statement, it was introduced in evidence by counsel. I don't know what admissions they could possibly refer to. The only thing he says is that he has no authority of any kind. That is what he says.

The Court: That is not the kind of admission for which they would offer it.

Mr. Andersen: I don't see how they could offer if for anything else. They must offer it for something. The only admissions in the document are that Mr. Albright had no authority to bind the International.

The Court: That would be an admission from your viewpoint, but not an admission from the

plaintiff's viewpoint and it couldn't be the admission they offered it for.

Mr. Andersen: Your Honor, when I made the statement your Honor said it was offered generally. I said yes. I directed to your Honor's attention it was offered generally and went in generally. I excepted to any limitation of the offer. The Court said "generally" and it went in generally, and that was the Court's ruling. I don't believe that makes [762] much difference for the purpose of this argument, whether it was generally or specially. It was offered by the plaintiff. We have got to take the words when it was offered by the other side and interpret the meanings, the meanings normally and naturally applied to the words. It says on the face of this document that he is not an officer or agent upon whom service of process could be made. That was on the Motion to Quash. It doesn't say he is, it says he isn't. They are certainly not offering this kind of exhibit for an affirmative reason.

The Affidavit itself, to which the subheading is attached, says: "Affiant further states with regard to the labor dispute currently existing between the Juneau Spruce Corporation and defendant Local Union 16 of I.L.W.U. as follows: 1. This is a dispute between the Company and Local Union 16. It is not a dispute between the Company and the I.L.W.U."

They can only use it for what it says. Secondly, "Affiant's activities in connection with this dispute in so far as they relate to I.L.W.U. have been

as follows: (a) Making general reports on the dispute to I.L.W.U. approximately semi-monthly; this is part of affiant's general duty to I.L.W.U." —I guess it means to keep it—"informed on the progress of all such matters in which his locals are interested. (b) Rendering to Local 16 his usual advisory services as requested from time to time by Local 16. Such advice has [763] "consisted principally of advice on questions of whether the action or contemplated action of Local 16 is or is not within the power of Local 16, and whether it is or is not advisable to take from time to time. (c) Affiant has made no request either on his own initiative or on behalf of Local 16 for any assistance, cooperation, approval, disapproval, permission or ratification of any kind of action taken by Local 16 in said labor dispute to I.L.W.U. or to any other locals of I.L.W.U. (d) There has been no assistance, cooperation, approval, disapproval, permission or ratification by I.L.W.U. of any of the action taken by Local 16."

To me, that means what it says, may it please the Court, and when it is introduced by the other side they vouch for its truthfulness. I think that is the general rule. They say that as the rule, and as a matter of fact, the International hasn't ratified, condoned, or anything with respect to this dispute. I don't see how it could be more clear than that, may it please the Court. There are other points I could raise, too. I am sure the Court has the evidence in mind.

To recapitulate, Mr. Bulcke talked to Mr.

Schmidt, I think he said back in 1947, several months before this started. Mr. Bulcke didn't enter into it except this afternoon, and that was stricken. The evidence is limited to statements of agents, whether they used Mr. Berry as agent or Mr. Albright as agent. They produced the statement that the [764] International has nothing to do with this think at all. That is the state of the evidence. Unfortunately I cannot, at this time, give your Honor any opinions of any Courts, any appellate Court at least, and I don't know—I know of one District Court case where they hold outright that no members of a Union may bind an International, or even a Local, no members may, because I know of one Union in this country, one Local of over twenty thousand members, so a member couldn't bind it. A Union isn't a partnership. A partnership is an organization doing business for profit. A Union is not defined as doing business for profit. They are simply associations. A recognized member of a trade union may not bind the Union. It must be somebody with authority. I cannot give your Honor authorities. There are none, so far as I know, but we do have the general common law rule, that is that a statement of an agent cannot bind the principal. I think that is a time-honored as well as time-worn rule, that is that a statement of an agent cannot bind a principal.

I move for an advised or directed verdict, whatever is the practice. Thank you.

The Court: Do you wish to make a statement?

Mr. Strayer: The only thing I can conclude is that the practice is different in common law in California than in the Northwest. There is abundant support for the implication in your Honor's statement; an interested party in an action, [765] if they introduce that statement in evidence—if there was a letter written by the I.L.W.U. in which they specifically said Albright had no authority, but in the same letter told him to come up and see that the pickets remained on—we could take the part that is to our advantage and disregard the part that is to our disadvantage.

The Court: If you specify the parts you offer it for, the point made by the defense, that hasn't been done. As I recall, you offered it for the admission.

Mr. Strayer: I offered it for the admission against, not by the International, and that was the reason why I offered both the Affidavit of Vern Albright and the document, two which it was attached, made by a party to this action. I don't think—even if it was limited to a single document the manner of offering it generally in evidence was for the purpose of availing ourselves of any admissions in it. I did definitely state at the time I made the offer that that was the purpose.

The Court: It is true an offer may be made coincidentally in that manner, but when it is qualified, your opponent can introduce the rest. If counsel for defendant has been mislead here, that you offered it without qualification, then he was deprived of offering the rest of it for his own pur-

poses, and I don't know whether he wishes to do that or not, but if you wish to qualify your offer—if it hasn't already [766] been done, I thought it had been, but if it has not—you can qualify your offer to include only admissions, then the defense must be given the opportunity of offering the remainder of it.

Mr. Strayer: I thought the record so showed. I offered it solely for the purpose of showing admissions of interest against the International Longshoremen's and Warehousemen's Union.

Mr. Andersen: Again referring to this document, so I can refreshen myself, counsel did say he offered it as an admission against interest. I objected—this is a four or five page document—to it, and the Court said it was being introduced generally in evidence.

The Court: What I meant by that was that no specific part was pointed out or specified except by the term "admissions."

Mr. Andersen: This is an inseparable document, a narrative. He couldn't take out a clause, sentence or paragraph. The whole document must be read together. I don't believe he would wish to do that.

The Court: For the purpose of an offer he could offer a sentence.

Mr. Andersen: Of course, but with this particular document, if your Honor read it I am sure you would agree with me, it wouldn't be done that way. He offered the whole document [767] as an admission against interest. He offered the whole docu-

ment, so the whole document is in evidence. There is no question about that. Counsel simply can't offer a document and by ipse dixit the document is or isn't. The document speaks for itself, not counsel's ipse dixit, so the alleged language of this is what I read to your Honor. This is offered as an admission against interest. This language that "I have no authority."

The Court: I don't construe it as an offer of the entire admission, but all those portions counsel wishes to take advantage of as an admission against interest and that only. I think I might as well avoid further argument on this point, because to remove any misunderstanding I have allowed counsel to modify his offer, and you have now—or at least when the jury is here again—the right to offer the rest of it.

Mr. Andersen: That puts us in a difficult position on this argument, may it please the Court, unless the Court wants—the whole document was offered in evidence and I think if your Honor were to change that rule it would be an error and I would except to it. The whole document is in evidence.

The Court: I think it is unnecessary to argue that in view of my allowing counsel to qualify his offer to remove any uncertainty on that point, by qualifying his offer.

Mr. Andersen: The whole document is before you and [768] before the jury. I told counsel he didn't have to worry about reading it when the

witness was on the stand, with respect to the newspaper. But the whole document is in evidence, the whole document being in evidence I on this motion have a right to use it for whatever service——

The Court: Everything but the admissions from the plaintiff's standpoint. Anything else that is in your favor is for you, if you believe it is in your favor.

Mr. Andersen: That is——

The Court: Those portions under the ruling of the Court no longer bind the plaintiff. It is received in evidence for its admission. You can consider whatever parts are in favor of the defense, but they are not chargeable with those under the qualified offer made a while ago.

Mr. Andersen: Maybe we don't understand this. As I understand, counsel has offered the whole document.

The Court: For its admission.

Mr. Andersen: So the whole document is in evidence. Being in evidence, I can use it for any purpose that I wish.

The Court: Certainly.

Mr. Andersen: And so I use it in support of our position that the International, it shows the International has nothing to do with this lawsuit. I use it for that purpose.

The Court: You can use it for that purpose.

Mr. Andersen: It says here, as I read a few minutes [769] ago, to paraphrase it, it said "The International never had anything to do with it,"

Albright speaking, "I don't have authority in so far as the International is concerned to bind it in any matter of this kind and it never ratified, condoned or approved anything that went on here." That is in the Affidavit.

The Court: I understand, but all it presents is a conflict in the evidence.

Mr. Andersen: No, I don't believe it presents a conflict, because again on the other facet of this, the only evidence we have is a statement of an agent. I don't care who they refer to, it is still just an agent. Albright is characterized in that document——

The Court: Is it sufficient if he is an agent?

Mr. Andersen: If they proved he was an agent and acted within his authority.

The Court: You said he was still an agent. I wondered if you contended that was insufficient.

Mr. Andersen: Your Honor, the only testimony we have in the case is that certain people testified Mr. Albright was the International Representative. Some of them have testified that, about three people testified that. Mr. Albright testified that he was an International Representative of the defendant I.L.W.U. I believe a couple other people testified in substantially the same manner, but all of them simply characterized [770] him as an agent. Of course, the rule of law is that when a person says he is an agent of anybody else, that doesn't bind the principal unless it is first shown that the agent actually was empowered or authorized by the

principal, or unless within certain areas there is a type of ratification. Those are the only instances in which a principal may be held, as I understand the law of agency, so here we don't find any authorization nor do we find any ratification. We find just to the contrary. It is easier for me to buy an automobile for John Jones and say "I am his agent. Charge it to him." That is the sum and substance. Albright said he is a Representative of the International Longshoremen's and Warehousemen's Union. That is the sum and substance of the evidence, but there is no evidence tending to show as far as the principal is concerned, that there was any authorization or ratification. It completely negatives the idea. I think I have expressed myself on the point as much as need be.

Mr. Strayer: The only thing I can add is that I think counsel is trying to say that we could prove an agency or the scope of agency in a declaration out of court. We don't have that situation here. Albright was present in court and testified he is an International Representative for the Union; on his authority, no extra judicial authority, his Affidavit has been filed by the Union and he said he had certain powers and we rely on those admissions. [771]

Mr. Andersen: That to which he refers, I assume, is the Motion here which is signed by Mr. Paul, by counsel, and it says that the said Vern Albright was not at the said time of purported service of summons an officer or agent upon whom

service of summons may be made, and so on and so forth. That is signed by counsel on a legal paper. I objected to its materiality because in these matters we don't bind our clients by a notice, but the Court admitted it in evidence.

To reply to Mr. Strayer, I don't know that because an agent admits it in court it adds any greater dignity, that he is an agent. It is of equal force out of court. It isn't a question of extra judicial authority. It has no more force outside of court than in court on that one aspect.

The Court: I forgot to ask counsel for the Local if they wished to be heard.

Mr. Roden: Mr. Andersen, may it please the Court, has stated his point very clearly. The agent cannot declare himself the agent and, where there is nothing to show that any action has been taken whatsoever by the International except so far as the statement of the pretended agent, so to speak, and it is taken for granted he is the agent, it is only his naked statement which is before the Court. He said "I am the agent." There has not been one scintilla of evidence showing that the International recognized him or acknowledged him as an agent, and under such evidence as introduced that he is an [772] International officer here and testified whether or not in fact he is such an agent, his own declaration is certainly not sufficient. I think that is the gist of it.

The Court: I think there is sufficient evidence on that point to go to the jury. Motion denied.

Mr. Andersen: I have one other point I would like to raise for preservation of the record. Your Honor will recall that when this dispute arose there was the I.W.A. which said, "It is all right with us, Mr. Hawkins of the Juneau Spruce Corporation, to let the I.L.W.U. do the work." That was the basis. There is a broad public policy in view of the fact the Taft-Hartley Act allegedly was passed for the purpose of avoiding jurisdictional disputes. The action of the Company here in refusing to turn it over to them vitiates the purpose of the act. It is undisputed at this point that up until July 6 the Company could have operated at full force simply by allowing the I.W.A. to relinquish under the contract. Testimony is in evidence by half a dozen witnesses, and the evidence is clear up to this point that the Company was simply standing on a contract by which they were not bound, may it please the Court, in so far as this aspect is concerned.

The Court: You mean the Local, after indicating willingness to relinquish?

Mr. Andersen: Yes. The I.W.A. told Company "We don't want trouble. We figure this work"—I am quoting [773] verbatim—"We figure this work belongs to the longshoremen. Let them have it. We don't want it." They wrote a letter, I believe April 8, a few days before the strike, telling the Company, "It is all right with us for you to give this work to the longshoremen." That is undisputed in the evidence. We take a broad pub-

lic policy that if the Taft-Hartley Act was passed to avoid or prevent jurisdictional disputes in industrial relations, then when a Company for no reason—and the Court will have to agree with me there was no reason in this case for the Company to refuse to hire I.L.W.U. men—and the Court must agree, there is no other evidence in the record. Let me show your Honor a figure here. I don't have to write them down. The payroll was $100,000 a month, that is the undisputed testimony. If the longshoremen did all this work they would have been paid between five and ten thousand dollars a year. Let's take the highest, $10,000 a year, but somebody has to do that work and somebody has to get paid for it, whether the man is a longshoreman or not is immaterial. Wages have to be paid. The testimony was that there was a slight difference in pay between the longshoremen and the mill workers. Let's assume it's twenty per cent, $10,000 worth of wages, gets it down to less than $1,000, less than one-tenth of one per cent of the money spent would have been for longshoremen's wages. What was involved was less than one-tenth of one per cent of the monthly payroll, may it please the Court—less than one-tenth of one per cent. Now we have the rule of de minimus which applies to things like this. That couldn't justify an employer in saying, "We won't hire them. We won't open the plant for a year and we will suffer a million dollars' loss over one per cent in the payroll." What was the Taft-Hartley Act

passed for? Was it so an employer could say to this Union, "There is no dispute among yourselves who shall do this work, no dispute at all. The amount of money involved is completely negligible, but nevertheless we are not going to do business with the longshoremen. You are going to have to do the work." That is their position. I call attention to the public policy in back of the Taft-Hartley Act. That is factual and not denied one iota by the testimony. What is public policy? What is good for the public at large, for the common weal. This Company, because it wouldn't spend to what amounts to less than $1,000, about $500 in wages, wouldn't spend $500 a year on $1,000 a month payroll, comes into court and says, "We had assigned the work to the I.W.A."

That is the only way they have even a toe in the door of this case, may it please the Court, so this Court has the matter of public policy. To permit an employer in that situation to rely on a lawsuit to make his mill pay profits, that is not my idea of public policy. I think this Company, according to the facts as we have them now, arbitrarily and arrogantly [775] asked for and got a labor dispute. This is the most unreasonable employer I ever heard of. When two Unions say, "We don't care who does the work. It is all right with us," it comes under the de minimus non curat lex doctrine for an employer to say, "We are not going to do business with the longshoremen." Even though he might say he would be deprived of his day in

court, it is a matter of public policy. I renew the motion.

The Court: You mean the provision of the law here, if construed in the light of what you say the public policy is, would make this not an unfair labor practice?

Mr. Andersen: I am not too familiar with the unfair labor practice, may it please the Court. That isn't what I say. I am only talking about the policy aspect of the law, the preamble to the Act and in the Act itself, states the public policy. I understand here that one unfair labor charge was filed and dismissed on account of this situation. I think the unfair labor charge—correct me if I am wrong—it was a result of a decision which came in only instituted sometime later, sometime in August. I am talking about the instance of this matter when it first started, may it please the Court. I understand that there were two filed, one before and one subsequent. The first one, I understand, was dismissed. I understand that the Board investigated it and dismissed it. That is along the line I am talking about, may it please the Court. [776]

It is not the policy of the Board, and couldn't be the policy of the Board, and couldn't be the policy of the Act, to prevent two Unions from adjusting work claims among themselves. It would be ridiculous. Here is an employer who can't be hurt and two Unions who say, "Look, rather than have a strike, the longshoremen have always done this work. We figure it belongs to them. Let them

do it." And nobody can complain about it, and most assuredly a Court—I am convinced if the public policy means anything and is applied, this is that type of case. The Court on the status of this ruling must agree with me, rather "hope," I don't like to say "must" to the Court. Those are the facts. The mill wanted to operate. The Woodworkers didn't want to do the Longshoremen's work. The Longshoremen wanted to. The two Unions agreed. For what reason did the Company say, "We want the Woodworkers to do it"? No reason. What is the expressed purpose of the Taft-Hartley Act? It is to foster good labor relations in the United States. That is the public policy of the Act. It simply boils down to the Company saying arrogantly, "We refuse to do business with the Longshormen. It is true the I.W.A. says, 'Let the Longshoremen do it,' but we are still not going to." Then they sue us for a million dollars. What is that but being arrogant and going contrary to the Act on the public policy aspect. It is a broad question.

The Court: Do you make this argument you just concluded [777] in support of this motion?

Mr. Andersen: Yes, your Honor.

The Court: As I said a moment ago, as I construe your argument you contend that the Taft-Hartley Act or those provisions involved in this suit should be construed in the light of that public policy?

Mr. Andersen: Yes, your Honor.

The Court: And that, so construed, the Court would have to hold that this was not an unfair labor practice? Is that correct?

Mr. Andersen: This Court doesn't necessarily proceed on an unfair labor practice, if I understand you.

The Court: Isn't that what you have got?

Mr. Andersen: Section 303 of the Act, which in effect says that they accuse us of creating a jurisdictional strike—that is what they accuse us of.

The Court: Under that clause it defines that as one of the unfair labor practices.

Mr. Andersen: I see what your Honor has in mind. As I understand the facts, they filed two charges of unfair labor practice. The first was dismissed after investigation. That was before July 6, when they returned to work.

The Court: I am not speaking of any charges before the National Labor Relations Board.

Mr. Andersen: I am talking about the same thing, your [778] Honor.

The Court: You mean the charges in the complaint?

Mr. Andersen: No. I understand that after April 10 and sometime before August they filed a charge against this Union.

The Court: With the National Labor Relations Board?

Mr. Andersen: With the National Labor Relations Board. I understand that was dismissed after investigation, and I understand the reason for it

was because the I.W.A. and the I.L.W.U. were in agreement, and that is the reason it was dismissed. That is why I say the public policy is so clear here. The investigation was made and the charge dismissed. They in effect held there was no unfair labor practice thereby. After July 6, when they returned to work, after that time, the present charge before the National Labor Relations Board was signed, substantially the same thing—the same accusations. It went to hearing, the factual hearing. We are not before the National Labor Relations Board. We are before a Court, and are determining broad questions of public policy. Answering your Honor's questions specifically so far as the first case in effect the National Labor Relations Board held it was against public policy. There was no charge to go to hearing. I ask your Honor to do the same thing.

The Court: What about the second charge? There was a second charge, and you call attention to one. Shouldn't you call attention to the disposition of the other? [779]

Mr. Andersen: The second was filed and went to hearing, and that is what plaintiff bases its case on. I don't want to split this in two parts. I could say to your Honor from April 10 to July 19 their conduct—I couldn't split it in two parts as they did before the Board. I think I would be right if I said that their conduct has been so arrogant, so contrary to public policy, that their original acts vitiate—all of their conduct vitiates the

whole thing right up to the end of the thing, from April 10 until today, not only from April 10 to July 19 when the Woodworkers went back to work. It was started by their own arrogant and intolerant attitude. On April 10 and 9 it was in their power as reasonable people to say, "O.K., I.W.A., you don't want the work; O.K., I.L.W.U., you do. You can have it." What have we a public policy for? They come in court and say that on April 10 they closed down—due to their own arrogance—and ask so much money for every day they were closed down, despite that they were unreasonable. Do they have a right to come into court? It is worse than a gambling debt.

The Court: How do you square your argument with the later finding of the National Labor Relations Board?

Mr. Andersen: At best it only relates to July 19 on, may it please the Court.

The Court: Aren't the factual elements the same?

Mr. Andersen: No, your Honor; as I understand the [780] testimony, April 10 there was a picket line. It is still there, but on July 19—I may be a few days off—the Woodworkers decided to go back to work. Before that situation existed the I.W.A. told the Juneau Spruce to let the Longshoremen do the work.

The Court: You mean on April 10 there was a repudiation by the I.W.A.?

Mr. Andersen: By the I.W.A.; correct, your

Honor. From April 10 until July 19 nobody can gainsay the statement that Juneau Spruce Corporation was arrogant in its attitude and in defiance of the stated purpose of the Taft-Hartley Act. As I stated, the National Labor Relations Board refused to prosecute. It is true on or about July 19 the I.W.A. changed its position and that, for the first time, gave rise to the hearing before the National Labor Relations Board. We do have the two halves of this problem. What I say, may it please the Court, is there can be no question as a matter of public policy, that from April 10 to July 19 Juneau Spruce served arrogant defiance, defiance of the public policy and the Taft-Hartley Act, in their so-called claim against the I.L.W.U., and from the second period out, on the same basis that their original action was so arrogant, so in defiance of public policy, that they themselves prevented a settlement. It was not even a jurisdictional dispute, because there was no jurisdictional dispute. Their own arrogance of April 9, 1948, [781] deprived them of an opportunity to settle that strike, settle that dispute. As a matter of fact, as I say, there wasn't even a dispute. The two Unions were in harmonious agreement. Look at the evidence on April 1—a committee of Longshoremen called on the I.W.A. and waited on them. Before the meeting they talked about this, that and the other thing. The I.W.A. went in and among themselves discussed the whole thing for an hour and then passed that Resolution which is in evidence—"We figure

this work belongs to the Longshoremen." They passed that Resolution. Mr. Flint testified he wrote a letter to the Company saying, "Give the work to the Longshoremen." There were harmonious relations between the two. Who created a jurisdictional dispute? Who, on that basis, created trouble? It could only be the Company. I say the Company cannot unreasonably create and foment a labor dispute, which it did, and then come into this Court, or any Court, and ask for money damages, may it please the Court, and so their conduct goes all the way back to April 10, or rather before, say April 7, 8, 9. It was in their power to amicably settle the dispute at no expense to themselves. What is the Taft-Hartley Act for? Is it to permit a Company to say, "There are two Unions there, but I am only going to do business with one of them. I don't care what the other Union wants or agrees to between themselves, it is immaterial. If you won't do the work I will sue you, and if they insist I will sue them too." Under this, they [782] could have sued the I.W.A., too, with as much reason and logic. The Company here simply decided they were not going to be reasonable under the Taft-Hartley Act and settle this lawsuit. I don't see how else you can look at it. These facts are completely irrefutable.

As far as plaintiff is concerned, it adds up like I have said. All you have to do is read the Resolution and that letter. Mr. Hawkins wouldn't do business. He had a contract with I.W.A. He

wouldn't negotiate with the I.L.W.U., sure, all right. He said, "If we did, maybe the Electricians would want a contract, or maybe the plumbers would want a contract." That is no concern of his. If the electricians wanted to come to him and ask for a contract it is their right. If the carpenters want to come to him and ask for a contract it is their right under the Act, and that applies to every other craft. We have industries with fifteen unions represented in their operations.

The purpose of the Taft-Hartley Act is to insure peaceful labor relations so that industry will not be disturbed. Now, who caused this trouble? Was it the I.W.A. who told the Longshoremen they wanted the Longshoremen to do the work? Was it the Longshoremen who went and said they wanted to do the work over the rail? The Longshoremen went to them and said, "The I.W.A. said we can do the work from the rail out," and the I.W.A. said, "Let them do the work." Where is the dispute? There isn't any. That is what the Company said April 9 and that has been their conduct to the present time.

The Court: You contend the law does not cover the situation as it existed between April 10 and July 19?

Mr. Andersen: The National Labor Relations Board.

The Court: I thought you were opposed to any finding of the National Labor Relations Board in this case?

Mr. Andersen Your Honor, it was only introduced in evidence for——

The Court: You are apparently relying on one for your argument.

Mr. Andersen: Your Honor takes notice of the Taft-Hartley Act. I don't have to prove that, and your Honor doesn't have to be concerned with the National Labor Relations Board, save and except as pleaded in the complaint. In relation to the Taft-Hartley Act, this Court must pass upon the facts in relation to the common principles of law, and that includes the Taft-Hartley Act, whether the National Labor Relations Board proceedings come in or not. Your Honor has a question of law before you.

The Court: You contend the law does not cover the situation as it existed between those two dates?

Mr. Andersen: The first two?

The Court: Yes.

Mr. Andersen: And that was by the fact that the [784] first charge filed against the I.L.W.U. was dismissed. That is extra judicial. For the purpose of this case that is an immaterial matter. The fact that the National Labor Relations Board may have made a determination is immaterial to the suit for damages, save and except as to the limits required by the allegations of the complaint in relation to the Taft-Hartley Act. They have to plead something about the Taft-Hartley Act because the suit is based on the Taft-Hartley Act. The point I am making is that on the Taft-Hartley

Act, as well as on general legal common law principles, they have no right to recover here because it is their own wrong, it is their own fault. That is what I say, and that is the only reason I refer to the Taft-Hartley Act, Section 303, which says under such-and-such circumstances people can sue for money if there is a jurisdictional dispute, may it please the Court.

The Company said they had assigned the work. That is the basis of their action, that the Company had assigned the work. If your Honor will read the Act your Honor will see that when they talked about assigning of work what they had in mind was a jurisdictional dispute, and so they say that if one craft is doing a job and another craft say they want it and they picket, it becomes an unfair labor practice. The first craft has the job and presumably a contract and the second craft says, "We want the contract."

Now, your Honor will recall that during the period [785] of the Wagner Act, there were a great many jurisdictional disputes of that kind. Your Honor will recall statements in the press and of the Congressional hearings. One of the primary things they wanted to do was stop jurisdictional disputes and strikes where one Union wanted the work and would picket. It would close the whole plant. The Company here said, "We assigned the work to the I.W.A." They are saying it is a jurisdictional strike; putting it another way, the facts show there was no jurisdictional strike. There

just wasn't any jurisdictional strike because that means there can't be a jurisdictional strike unless two Unions are competing for a certain type of work, both claiming jurisdiction for it. Short of that, there can't be any strike.

Between the two Unions there was no argument. That is the evidence. I don't believe I have to cavil about that. So, the Company, with no jurisdictional strike, chose to close its plant rather than operate. All they had to do was say to the I.W.A. "If you don't want the work under the contract—it is your benefit, you can always waive the benefit—you want to assign it to the I.L.W.U., but don't complain in the future about it," they would say to the I.W.A. There is no jurisdictional dispute when two Unions are in agreement.

The Taft-Hartley Act was passed and for this litigation its relation to the jurisdictional strike is the—I think it is very clear, may it please the Court. If those are the [786] facts, I say that no employer has the right under the Taft-Hartley Act to say when there was no jurisdictional dispute "Rather than hire Longshoremen I won't operate my plant" and that is in effect what they did, may it please the Court. "And if I can't operate the plant and I lose money under Section 303 of the Act I am going to sue you for damages." That is what the Company said. How are the facts susceptible of any other construction? Are we to follow along the lines of Mr. Hawkins? He said he had a contract with the I.W.A. for them to do

that work. Of course, he didn't have a contract at that time. I don't have to talk about it, it was assumed he had a contract. What sort of two million dollar corporation is this? They have a penny-ante payroll too small to compute. They have a contract with the I.W.A. for millwork and they stand on that contract. It could have been modified with the drop of a hat by saying, "Let the arrangement be that since the I.W.A. doesn't want the work, let the I.L.W.U. do it." Who was hurt? Instead of that the Company closes for a year, payrolls are locked, the Company claims they lost money, and now wants a million dollars from the Longshoremen for something they could have avoided by being reasonable.

It is embodied in the Taft-Hartley Act that they can't bring a labor dispute into full blossom and then come into court and say "We want a million dollars." To join the two halves together, in view of their original arrogance, it [787] prohibits and vitiates all their conduct. Does your Honor have any further questions?

The Court: No. Do you wish to answer that?

Mr. Banfield: Counsel has made a few misstatements. In the matter before the National Labor Relations Board there never was anything dismissed by the Board. This Company made a charge and filed it in the office. The original directors in Seattle who acted on behalf of the general counsel refused to allow the complaint. It was a refusal on the part of the general counsel's

office to issue a complaint. His reason for so doing, he said there weren't two Unions contesting, and his personal opinion, not having a decision of the Board, he felt that it was not a jurisdictional dispute. We told him all along it didn't have to be; it could be a dispute between Longshoremen and the Company, where the Longshoremen told the Company who they had to hire, so nevertheless the general counsel's office persisted in its position, but when the men went back to work we decided to amend the complaint, or that a complaint should be filed—not a complaint but a charge. It is like going to the District Attorney's office and asking to get out a complaint.

This is what the National Labor Relations Board said: "On the record before us, we are satisfied that the conduct that the charge alleges the respondents engaged in, comes within the purview of Section 8(b)(4)(D) of the Amended Act. [788] Accordingly, under the language of Section 10(k)(4) we are 'empowered and directed to hear and determine the dispute' out of which the action arose." That is what happened. The Board does not say one single word about our original charge. It didn't take any notice of it at all, because it had no authority to make the general counsel do anything, but I am convinced that if the general counsel had this opinion in his hand, when we first filed a charge—because he now knows where he stands. We have had counsel interpret public policy. That is the queerest I have ever heard of here in the

United States that in a productive unit, such as a sawmill, the two Unions have a right to set down and figure out the work and serve notice on the employer that that is what he has to do. So many out of this Union for this, and so many out of this one for this, and serve notice on the employer, and if he doesn't he is acting contrary to public policy and has no means of action.

In other words, this Court could not decide whom to hire as Bailiff if a Union decided on some other man. Permitting an employer to hire whom he pleases well prevents discrimination, because of Union affiliation, and it is only on a basis of ability, experience, and so forth. You can't use unionism to determine who you are going to hire, and discriminate because he does or does not belong to a union. An employer hires men. It makes no difference to him what Union [789] they belong to, and that is true in their hiring down there, but where over half of them are represented by one Union, you can make an agreement whereby a Union is the exclusive bargaining unit. Where they give that right, the Electricians' Union can't go down to the plant and say, "You have got to sign a contract with us." In this case counsel said the I.W.A. said, "Give them the work." Are we on the other side of the Iron Curtain? People tell us the ideal unit is sitting in circles and not consulting the employer. That mythical situation hasn't arisen even in Russia. In this country public policy—in the United States—is assigning work to

whomsoever he employs. Once in that work, he can't discriminate against them because they belong to a certain labor organization. The policy of the United States and in the policy we are under, Unions can't split the work and tell the employer whom to hire. You can still run your own business.

Mr. Andersen: As far as the general counsel of the National Labor Relations Board, I think procedurally and factually what he said is correct, but this fact remains: the first complaint where a charge was filed, after an investigation they refused to file a complaint, it wasn't until after the I.W.A. changed their position that the new complaint was filed. The new complaint and then the charge was filed. That was sometime in August, may it please the Court. With respect to the public policy of the law, permit me to read it to your Honor. I think we both know what public policy is.

"Section 1.(a) This Act may be cited as the 'Labor Management Relations Act, 1947.'

"(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

Let me go back and underscore, "that neither party has [791] any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." So, this first charge was filed by this Company against the Union, an investigation was made and the general counsel, who has a great deal of authority under the Act, much more than a District Attorney—that is only an aside—he dismissed it. There is no question about it. It wasn't until after the I.W.A. changed its stand that the amended complaint was filed to bring in the changed situation where the I.W.A. then claimed to do the work. That was a jurisdictional dispute.

What is public policy? Did I misquote it? I told you what I thought public policy was, as expressed in the Taft-Hartley Act. That Act says

no steps shall be taken "inimical to the general welfare." Labor disputes should be settled peaceably and amicably. That is the public policy of the Act.

May I state it again, the Woodworkers said, "We figure the work belongs to the Longshoremen." There is no argument about that. The Longshoremen contend that they have been doing this work for years. We know loading of waterborne commerce from time immemorial was Longshoremen's work. Even by the Constitution of the Woodworkers—the committee goes to the mill, the employer says, "We are not going to let you adjust it among yourselves. We are going to tell Unions the when and where and why of hiring them." He talks about the [792] Electricians. Certainly they have a right to say, "We want to negotiate a contract with you. We want to carve a unit out of this plant." We don't have any law that says plants must be on an industrial basis. The Taft-Hartley Act encourages the small units and organizations and provides the means, like the United Auto Workers cut in a small place. The Act provides some place that a definable unit can be carved out. They express themselves and are united by themselves.

By what right do these gentlemen say Electricians don't have a right, that the right is given to Mr. Hawkins. He said, "I am not going to have the Electricians talk to us, or the Plumbers, or the Carpenters." By what authority does he arrogate

that? He says, "There is no jurisdictional dispute. We are going to sue for one million dollars."

What is the public policy under the Act, may it please the Court? It couldn't be clearer than that part of the Act which I read, common ordinary decency and common ordinary sense. There was no jurisdictional dispute. There just wasn't any. There was no dispute, may it please the Court. Where is the dispute? How can we imagine a dispute there?

The Court: Wasn't there a dispute before the relinquishment?

Mr. Andersen: No. [793]

The Court: Two Unions claiming the right to that work?

Mr. Andersen: Are you talking about April 10?

The Court: No; I am talking about before April 10.

Mr. Andersen: The situation before April 10 —there was no dispute. There were two Unions, particularly the I.L.W.U., which thought the work should be theirs. What did they do? They acted in accordance with the Taft-Hartley Act, within the spirit and the public policy of the Taft-Hartley Act. They went to the Company and said, "We would like to do this work."

The Court: Why didn't they go to the Company between April 1 and the time of the contract, in November?

Mr. Andersen: They did, your Honor. They first went early in September or October. That is the testimony.

The Court: Wouldn't you say at that time there was a jurisdictional dispute?

Mr. Andersen: No. There was no dispute.

The Court: Both were claiming the right to the same work.

Mr. Andersen: So far as the Taft-Hartley Act is concerned, the dispute is a closely defined thing. It has to be right up to the point of a strike. That is a jurisdictional dispute. There must be cessation of work. Short of that, negotiation or conciliation; no cessation of work. The Taft-Hartley [794] Act was designed to prevent cessation of work. It wants disputes settled. Before April 10 the Longshoremen went to the Company and said they wanted the work. They didn't get a favorable response from the Company, so they went to the Union. They didn't want trouble. They said we have always done it. Even the pre-existing contract is in evidence. They said, "We have always done the work." And the Union—the I.W.A.—agreed with them.

There can be no dispute, may it please the Court, when there is an agreement. There can be no jurisdictional dispute when there is an agreement between the Unions involved. They are mutually exclusive terms, may it please the Court.

The Court: When you spoke of public policy and peaceful relations, it could also be argued it doesn't mean Unions after a contract has been executed, a contract for a bargaining agent. You could be arguing—you are certainly not recogniz-

ing—that you could pick out a subsequent and not an initial dispute, as not being in conformity with the labor policy of the Act. It seems to me your argument cuts both ways.

Mr. Andersen: I don't follow your Honor there, frankly.

The Court: Perhaps it isn't important.

Mr. Andersen: The Taft-Hartley Act is not concerned [705] with what we would call an immediate dispute, that would immediately flare up. The facts here show that in October when they had their first meeting and the Company said they had a contract with the I.W.A., that wasn't correct, that wasn't true. They told them that they already had a contract, when as a matter of fact there was no contract, and that is the evidence by Mr. Schmidt and also by Mr. Flint. They didn't have one until November 3. The Union went to the Company before they had a contract and said they wanted to negotiate a contract. The Company didn't tell the truth. In the letter dated October 18 Mr. Schmidt says the I.W.A. Union turned the contract down. There was none until November 3. The Union went before there was a contract and said, "This work belongs to us. We claim it. We want to negotiate with you for it." That was the testimony of Mr. Schmidt, and he says in the letter, "I stalled them" off. Let me have that letter, please, I would like to read it to your Honor. The letter says "I stalled them" off. That is it. "We presented the Union Contract"—speaking about the I.W.A.—"and it has been turned down by the Un-

ion." He says, "Yesterday the C.I.O. Longshoremen's Union Representative came in and raised a rumpus about us loading the scow for transshipment either to Seattle or Prince Rupert"—this letter is written October 18, "claiming the right to load any cargo over the rail. I brought up the point this was material for our own people, being towed by [796] our own boat. They insisted that it makes no difference." So far they are within the realm of reasonable labor relations arguing back and forth. "I have stalled them until you get back, which at that time I thought would be this week." So, on October 18—your Honor said why didn't they go there before they had a contract—that is irrefutable evidence that the Company had no contract on October 18. That shows there, Mr. Schmidt says "I stalled them" along until next week or so. Your Honor said good labor relations—they went to the Company and said we want to do this work. The Company was stalling them along.

You will recall the other evidence. After the twenty-ninth meeting, they went there before the contract was signed. It wasn't signed until November 3. That is the situation. They did everything reasonably required of them under the Taft-Hartley Act. The employer had it in the palm of his hand to resume operations and, as I say, arrogantly refused to do it, absolutely and contrary to the public policy under the Act. I know of no rule of law which permits people to take advantage of their own wrongdoing.

The Court: Well, at this stage of the case I think the motion should be denied.

(Whereupon Court adjourned until ten o'clock a.m., May 10, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: You may proceed.

DEFENDANT'S CASE

MIKE SESTON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Roden:

Q. Mr. Seston, will you please state your full name? A. Mike Seston.

Q. And how long have you lived around the town of Juneau? A. About six years.

Q. What has been your occupation principally during that time? A. Miner.

Q. In 1948, the early part of the year, what occupation did you follow?

A. Sawmill worker.

Q. For which sawmill company did you work?

A. Spruce; Juneau Spruce Corporation.

Q. Juneau Spruce Corporation. Do you remember the time, April 1 of 1948? I will take that back. At that time were you a member of the I.W.A.? A. I was. [798]

Q. The International Woodworkers of America?

(Testimony of Mike Seston.)

A. Correct.

Q. How long had you been a member of that organization? A. Since 1944.

Q. And I take it that since 1944 you had been a member of the I.W.A. and had been employed at the Juneau——

A. Juneau Lumber Mill.

Q. At the Juneau Lumber Company's plant, up to the time that the Juneau Spruce Corporation took over, is that right? A. That is right?

Q. And you continued to work for the Juneau Spruce Corporation after that for some time?

A. I did.

Q. Now on the first day of April, 1948, do you remember a meeting being held on that day in which some members of the Longshoremen's Union appeared? Do you remember that meeting?

A. Yes; I remember. That was my first day coming back to work.

Q. Can you tell the Court and jury where that meeting was held?

A. The meeting was held at eight o'clock in the Miners' Hall.

Q. And who called the meeting?

A. Gus Lee, Vice president of the Union.

Q. Gus Lee, the Vice President of the I.W.A.?

A. I.W.A.

Q. And that meeting was actually held, was it?

A. Yes.

Q. Now, before that meeting was held by the

(Testimony of Mike Seston.)

I.W.A., did any members of the Longshoremen's Union appear at your Hall?

A. When the meeting was called to order there was nothing but members present, around fourteen or fifteen members were present.

Q. At the actual meeting, but before the meeting opened was there anybody present who represented the Longshoremen?

A. When it opened there wasn't any longshoremen present in the place.

Q I didn't get that.

A. I said nobody was present except the members of the I.W.A.

Q. But before their meeting took place, was there anybody present except I.W.A. members?

A. Fourteen members.

Q. Fourteen members of the I.W.A., is that right? A. That is right.

Q. Was anybody present there of the longshoremen before your meeting opened?

A. I never noticed anyone.

Q. At that time was there any talk about the loading of barges, at that meeting?

A. When the meeting was established, come to order, they [800] called the longshoremen, being they was downstairs and told them to come up and present their view.

Q. The representatives of the Longshoremen were downstairs in your Hall?

A. That is right.

(Testimony of Mike Seston.)

Q. And this Hall is a two-story affair?

A. Two-story building.

Q. And you people, that is the I.W.A., met upstairs and some of the Longshoremen were waiting to be called and were downstairs?

A. That is right.

Q. Do you remember who presided? Who was the Chairman?

A. The Chairman was Gus Lee, the Vice President.

Q. Do you know who the Secretary was that night?

A. The Financial Secretary was Gordon Peterson, and I couldn't remember the Recording Secretary.

Q. Was Gus Gustafson the Recording Secretary?

A. I couldn't positively state what is his name.

Q. After your meeting had been called to order, word was sent down to the Longshoremen waiting downstairs to come and appear before the meeting, is that right? A. That is right.

Q. Please tell the Court and jury what happened then.

A. They brought up the question the first thing, I think, George Ford, he was Chairman of the Committee—I think [801] there were four of the Committee present at the time—it was George Ford and I couldn't think of all those names—now—Joe Guy——

(Testimony of Mike Seston.)

Q. And a man named Wheat?

A. And an old man, Wheat, and a fellow by the name of Burgo, I couldn't pronounce his name.

Q. Those were the four members, as I understand you to say, who represented the Longshoremen. Is that right? A. That is right.

Q. State what was said, first of all by the Longshoremen and then by members of the I.W.A.

A. The President called attention of the members at the time that we wanted to hear from the Longshoremen. Gus Lee stated we wanted to hear their story, so the first man on the floor there stated they went down to the Spruce Corporation to see what they could do with the Company to load the barges, equipment in interstate commerce, as it belonged to them, and was a past practice and they had done all that work and that the Company—Mr. Hawkins—wouldn't listen to them, so they come up to the Union; that they wanted to get their sanction and to respect their picket line. They voted on putting a picket line and they was talking for quite a while, three members were talking. One was just sitting listening. I think we were supposed to have three members on the Committee. So we were just listening, the rest of the members. When they got through we assured them we would respect the picket line. [802] t

Q. Now, as I understand you to say, these representatives of the Longshoremen were talking about the loading of the barges?

(Testimony of Mike Seston.)

A. That is right.

Q. And that Mr. Hawkins, the Manager of the Juneau Spruce Corporation, would not listen to them or would not talk to them about it? Is that right? A. That is right.

Q. Then what happened?

A. Nothing happened excepting we called to their attention that we would respect the picket line.

Q. Let me put it this way: Those representatives left your meeting, did they?

A. We ordered them out because we got to hold a meeting.

Q. You ordered them out of the Hall?

A. They walked out and we continued with the conducting of the meeting.

Q. When you say "ordered them out" you don't mean that any difficulty had arisen?

A. No. We told them we were going on with the affairs of business.

Q. The meeting was a meeting of the I.W.A.?

A. I.W.A.

Q. What did the I.W.A. do about this situation, if anything?

A. The first thing, the Vice President, he refused to serve as Chairman of the meeting, then the members decided to call for nominations of an officer, of the Chairman or President, and nomination was called. I couldn't tell you who called the nomination. Mr. Flint, he was nominated as Chairman and President for 1948.

(Testimony of Mike Seston.)

Q. Did he take the chair then, that evening?

A. No. He was the main speaker on the subject of the trouble that was supposed to be between the Longshoremen's Union.

Q. He was the main speaker? That is, William Flint? A. Yes.

Q. Who later on became the President of the I.W.A.? A. That is right.

Q. What did you talk about?

A. Well, talked of the thing that involved the sawmill workers to understand where—they talked on the question whereby the sawmill workers would be injured if the Longshoremen put up the picket line, and the same time the question was going on pro and con on the subject and one of the members got up and stated the jurisdiction of the sawmill workers and what is our purpose and work and claimed that our work, according to the ritual of our Constitution of the I.W.A., was from the stump to the finished product. That [804] is as far as we are supposed to handle, that is the jurisdiction of the I.W.A. That is as far as we can go.

Q. That talk was made in connection with an article in your Constitution, is that right?

A. That is right.

Q. Somebody called that to the attention of the meeting; that is correct, isn't it? A. Yes.

Q. Then what was done?

A. Then everyone was expressing an opinion. Some expressed it to prove that the scows and dif-

(Testimony of Mike Seston.)

ferent equipment was used down below like that the lumber to Puget Sound was handled on the barges by the sawmill workers in low inland waters.

Q. Lumber on the barges was handled by members of the I.W.A., if a barge operated on inland water? A. Inland water.

Q. Was anything said about barges operating on the high seas?

A. Another got up and said they had done it in different places in inland water where the lumber workers loaded scows and when the scow went in deep water the handling of the barge was the Longshoremen's.

Q. I understand you to say then that in inland waters the I.W.A. members would load the barge and that barge would go and discharge lumber to a steamer or barge going to the [805] high seas, is that right? A. On the high seas.

Q. At that meeting was there any resolution passed such as contained in exhibit—I show you Defendant's Exhibit No. A. You look at this.

A. My eyesight is not very good.

Q. Let me read it to you.

A. You better read it.

Q. "Special Meeting, April 1, 1948, Discussion Between Labor Committee of I.L.W.U. and those attending meeting relative to loading of barges and ships. Motion made and seconded to go on record to not load barges. We figure this work belongs to the Longshoremen. By a written vote—thirteen members present."

(Testimony of Mike Sestan.)

Mr. Andersen: It says "Unanimous," I believe.

Q. Yes. "Thirteen members present—unanimous." Do you remember of anything like that being done that night?

A. Yes, we voted. Fourteen members was present. We had a standing vote. Thirteen was standing up and one was sitting down.

Q. After this meeting and you had taken the action as you have now indicated, did you tell the Longshoremen as to what had happened at your meeting?

A. A committee was appointed to tell the Longshoremen our action. [806]

Q. Do you know of your own knowledge whether or not that committee did inform the Longshoremen? A. Beg pardon?

Q. Do you know yourself whether or not the committee which you people appointed did inform the Longshoremen of your action?

A. I couldn't say.

Q. You couldn't say? All right. Now, then, as I understand you to say that this motion was adopted at the meeting at which fourteen members of the I.W.A. were present, and when the vote was called thirteen stood up voting in favor of it and one remained seated, is that right?

A. Correct.

Q. Now then, was there any meeting held about a week or so after this meeting?

(Testimony of Mike Seston.)

A. A meeting was called on the ninth of April.

Q. Who called that meeting, Mike?

A. It was called by Mr. Flint.

Q. And what was the purpose? Why was that meeting called?

A. The meeting was called on the purpose that a picket line would be established the next day.

Q. You people wanted to consider the situation?

A. Correct.

Q. That meeting was also held at the Union Hall? A. The Miners' Hall. [807]

Q. How many people were present at that meeting?

A. I would estimate around one hundred and eighty, one hundred and ninety.

Q. Were all these people who were present, were they members of the sawmill workers' Union?

A. They were.

Q. Some may not have been, but were working at the sawmill at the time?

A. If you want me to state in my own words——

Q. Yes, state it in your own words.

A. When the meeting was called to order and it was a large turnout they didn't know if they were all members or not. They were sworn in as members, into the organization at the time so they could take action on the floor. They were sworn in at the time.

Q. All sworn in as members of the I.W.A.?

A. That is right.

(Testimony of Mike Seston.)

Q. Then tell us what happened then? Who was the officer—the Chairman of the meeting?

A. Mr. Flint.

Q. That is William Flint? A. Yes.

Q. Who was Secretary, if you remember?

A. The Secretary was Gordon Peterson, Financial Secretary. They got a Recording Secretary but I can't think of his [808] name.

Q. Tell the Court and jury what happened at that meeting.

A. The question was on the floor pro and con—different ways—what was going to take place. Mr. Flint announced, or stated what had taken place himself.

Q. Can you tell us what Mr. Flint did say, as a matter of fact?

A. He said—in the first place they read the minutes of the previous meeting.

Q. And that was the meeting of April 1?

A. Of April 1.

Q. That is the minutes which I have read out to you, or did read out to you a moment ago?

A. Yes, that is the same minutes.

Q. Go ahead.

A. The minutes were read and he asked if there was any correction or omission in the minutes. Nobody responded or said anything. The minutes was approved as read. Then they called attention to the members to express their opinion regarding the picket line, what they were going to do about it.

(Testimony of Mike Seston.)

Q. What was that?

A. Different guys had expressed the opinion to respect it. A majority of them expressed it. According to the Constitution of the C.I.O. organization, that we should [809] respect the picket line. It went on for over half an hour, till they called—they put it in a motion to respect the picket line.

Q. At that meeting, I will read to you again from Defendant's Exhibit A, "Special Meeting, April 9, 1948, Discussion on Conditions Relative to I.L.W.U. loading barges. Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of I.L.W.U." Was that kind of resolution or motion adopted that night?

A. The first of April?

Q. I am now on the second meeting, when the question of the picket line——

A. Yes, we voted not to cross the picket line on the ninth.

Q. The ninth of April?

A. The ninth of April.

Q. That is what it says here "Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of I.L.W.U." That is what happened that night, is that right? A. Yes.

Q. And that is the meeting at which Mr. Flint presided himself? A. That is right.

Q. Do you know whether or not the action which

(Testimony of Mike Seston.)

was taken at this meeting of April 9 was communicated to Mr. Hawkins, [810] whether he was advised as to what the I.W.A. had done that night?

A. It was communicated the next morning. A majority of us went down to work like nothing happened, most of us. Nobody went across the picket line. That is all what happened.

Q. The picket line was there?

A. The picket line was there.

Q. And the I.W.A. members recognized it?

A. Recognized it. They never went through the picket line.

Mr. Roden: I think that is all.

Cross-Examination

By Mr. Strayer:

Q. Mr. Seston, on your meeting of April 1, Mr. Ford and Mr. Guy, Mr. Wheat and Mr. Burgo were there. As I understand your testimony they told you this work of loading the barges belonged to them, is that right? A. That is right.

Q. They told you they had always done that work before? A. Yes.

Q. Did they tell you they had a contract with the Company to do that work?

A. A verbal contract, or had a contract. We couldn't prove it ourselves if they had it or not.

Q. Did they tell you they had a contract with the Juneau Spruce Corporation or the old company, the Juneau Lumber Mill?

(Testimony of Mike Seston.)

A. They stated they had a contract with the Juneau Lumber Mill.

Q. And did they say that that contract carried over to the new Company?

A. They did. That is what they stated, that when the Company took it over that labor condition went with it.

Q. They told you then that the new Company, Juneau Spruce Corporation, was bound by that contract they had with the old Company?

A. That is right.

Q. And did they tell you they did this kind of work all up and down the Pacific Coast?

A. The inland water; quite a few places down around Columbia River, Puget Sound and different places—inland water work was done by the sawmill workers.

Q. This is what Mr. Ford told you now?

A. Mr. Ford—I couldn't state if it was Mr. Ford or Mr. Joe Guy, whoever was on the floor they gave their view.

Q. They told you some of this work was done by sawmill workers on inland waters?

A. Yes.

Q. But claimed none was done by sawmill workers on ocean-going barges? [812]

A. They stated that.

Q. Did they tell you they had been certified by the National Labor Relations Board?

A. They stated at that meeting any controversy

(Testimony of Mike Sestan.)

between Mr. Hawkins and the Longshoremen; they showed to the members of I.W.A. what took place and they asked for support at that time.

Q. They asked for support of their demands at that time? A. Yes.

Q. Did they tell you the I.W.A. Constitution didn't permit you to load barges?

A. They didn't say that; they were not in a position to tell us what the Constitution of the I.W.A. is.

Q. Didn't they get out your I.W.A. Constitution and tell you that your work was only from the stump to the finished product?

A. That was brought out by a member of the I.W.A.

Q. Mr. Ford didn't say anything about that?

A. Not to my knowledge. Mr. Ford had nothing to say regarding it.

Q. Which one was it brought it out?

A. One of the members attending the meeting.

Q. Do you know which member it was?

A. I believe it was Mr. Turner?

Q. Mr. Turner? [813] A. Turner.

Q. Turner. He was a member of the I.W.A.?

A. He was.

Q. And did you have a discussion of the correspondence that you had had with your International I.W.A. about this jurisdiction?

A. We had—that was we communicated with the International Union in Portland, Oregon. When

(Testimony of Mike Seston.)

they brought the question up, what was taking place between the Longshoremen and the Juneau Spruce, that was—I couldn't recall exactly the time, but it was in 1947, in the fall, I believe, on the end of October or the first part of November. That is the first time it was ever brought up.

Q. Did you discuss that correspondence at this meeting on April 1?

A. Yes. It was brought up at the meeting there, what some member brought up, and it was read—correspondence from the International which stated by the International that they understand the situation at Juneau; that they will—that they would advise us to act according to previous practice.

Q. Were you told at this meeting on April 1, Mr. Seston, that this practice of loading lumber on barges was new practice that had never been done before?

A. It was brought up that it was new work which never had [814] been done before in Juneau.

Q. You knew that yourself, too, didn't you?

A. I knew it, that it was new practice.

Q. Was it mentioned at this April meeting that the International of I.W.A. had advised you that if this work was new practice of the Company then the mill crew should put the lumber on the barges?

A. The way I interpreted it, it was stated in answer to our communication that we go according to the last practice, what took place in practice for some time, for a year, is the way we stated

(Testimony of Mike Sestan.)

in the correspondence to the International, that Longshoremen would load the barges and boats in interstate commerce.

Q. Was this telegram read to you at your meeting on April 1? A. Telegram?

Q. Let me read a part of this telegram to you, Mr. Sestan, and see if it will refresh your memory. This is a telegram from Virgil Burtz, Acting Secretary-Treasurer of I.W.A. at Portland, Oregon, dated October 30, 1947, addressed to Mr. O'Day, who at that time I guess was your Secretary. He says with reference to loading barges "If this is a new practice of the Company then the mill crew should put the lumber from the sheds to shipside and the Longshoremen take it from there and load it with ship gear. The loading of barges, scows, etc., with Company [815] equipment is under our jurisdiction. This is the way it is handled on Pacific Coast. Although we have had minor disputes with Longshoremen over this matter we have always won out." Now, do you recall whether that telegram was read to you at this meeting of April 1?

A. I don't recall that the telegram was read at the time, but it was discussed by the members present.

Q. It was discussed by the members present?

A. Yes.

Q. Was that part of it discussed, about uniform practice of the sawmill workers to do the loading where Company-owned barges were concerned?

(Testimony of Mike Seston.)

A. Everything was discussed from beginning to the end, whatever may involve I.W.A.

Q. Now you said that Mr. Flint made a statement at the meeting. Mr. Seston, did you say that you thought the sawmill workers had better not go through the picket line, is that right?

A. That is right.

Q. You said there might be trouble if you did go through the picket line, is that right?

A. I might say that would be advisable according to the Constitution of the C.I.O., to respect the picket line.

Q. The Constitution of the I.W.A. or C.I.O.?

A. Of the C.I.O. and I.W.A. [816]

Q. Requires you to respect a picket line?

A. Yes.

Q. Was there any talk there about a possibility of violence if you did go through the picket line?

A. It was possible at any stage.

Q. Was that discussed?

A. Discussed it as a possibility that could take place.

Q. Was it discussed that if you did go through the picket line you would be blacklisted and wouldn't be able to get work elsewhere?

A. Yes. That part was discussed, too.

Q. Did those things have an influence in your decision not to go through the picket line?

A. We abided on our oath to respect the picket line.

(Testimony of Mike Seston.)

Q. Did these other matters have any effect on your mind in your decision to respect the picket line? A. Yes.

Q. Is this right, Mr. Seston, that really your decision to respect the picket line was that you wanted to avoid trouble?

A. I didn't get the word "right"—what?

Q. Is the reason you decided to respect the picket line that you wanted to avoid any trouble?

A. That is right.

Q. In other words, you were confronted with a situation here [817] where there was an argument between the Longshoremen and the Company?

A. And the Company.

Q. And you wanted to stay out of it if you could? A. Correct.

Q. And you felt if you crossed the picket line there would be trouble? A. Possibly.

Q. Did you make any attempt to find out from the Company whether the representations of the Longshoremen were true or false?

A. Made to me? I just listened as a member of the I.W.A.

Q. Did your I.W.A. Committee attempt to check the accuracy of those representations?

A. Just that they had contact with the Longshoremen and went down to Mr. Hawkins. That is the only report I heard in the Miners' Hall at the meeting.

Q. Wasn't it reported back to your Union that

(Testimony of Mike Seston.)

the Company had no contract with the Longshoremen.

A. They hadn't come back with any. They just stated what took place between the Committee. I think they went down around the sixth or seventh of April, the combined meeting of 1-16 Longshoremen and I.W.A. Committee.

Q. Wasn't it reported back to you that the Company denied it had any contract with the Longshoremen? [818]

A. That is what they stated at the time. Mr. Hawkins stated they never had any contract except verbal for work for sometime.

Q. You knew that under your contract with the Company, the I.W.A. contract, this new Company recognized the I.W.A. as the exclusive bargaining agent for all of its employees, didn't you?

A. That is right.

Mr. Strayer: That is all.

A. Not for all the work.

Mr. Strayer: Just a moment.

Q. Are you still a member of the I.W.A., Mr. Seston?

A. I am working at the Cold Storage plant. I had to get a withdrawal card.

Q. What kind of work are you doing now?

A. Cold storage.

Q. Are you doing longshore work for the Cold Storage?

A. No. I work for the Cold Storage Company.

(Testimony of Mike Seston.)

Q. Are you a member of the Longshore Union now?

A. I just deposited my withdrawal card from the sawmill workers' Union into the Warehousemen's Union.

Q. You are now a member of the Local I.L.W.U.?

A. Not yet, until they pass on it.

Q. You are a permit man at the present time?

A. Permanent worker. [819]

Q. No, I mean they gave you a permit for you to work down there?

A. A permit, until it goes through Union procedure.

Q. You have an application into the I.L.W.U. for membership in the Local?

A. That is right.

Q. You haven't worked for Juneau Spruce Corporation then since April 9, 1948?

A. April 9, 1948; correct.

Q. When you made the decision not to go through the picket line, your idea, was it not, was to give the Longshoremen a chance to try to get together with the Company?

A. I didn't have any idea, but to bind ourselves according to our Constitution to respect the picket line.

Mr. Strayer: I think that is all.

(Testimony of Mike Seston.)

Redirect Examination

By Mr. Roden:

Q. Now, Mike, you people—you members of the I.W.A., didn't go through the picket line because you adopted a resolution or motion on the first of April to the effect that "We figure" that this work of loading of the barges "belongs to the Longshoremen."

Mr. Strayer: Your Honor please, I think counsel is leading the witness. [820]

Mr. Roden: I am reading from the motion.

Q. Isn't that correct?

Mr. Strayer: I object.

The Court: Repeat the question.

Court Reporter: "Now, Mike, you people—you members of the I.W.A., didn't go through the picket line because you adopted a resolution or motion on the first of April to the effect that 'We figure' that this work of loading of the barges 'belongs to the Longshoremen.' "

The Court: The objection is sustained on the ground that it is leading.

Q. Now then, Mike, tell us why you recognized the picket line?

Mr. Strayer: I think the witness has already testified to that, your Honor.

Mr. Roden: Let him testify to it again.

The Court: If there is any uncertainty about his testimony he may testify about that.

(Testimony of Mike Sestan.)

Q. Have you answered? Have you told us, Mike, why you honored the picket line?

A. Because we voted in the Union to adopt a resolution that we will respect the picket line.

Q. And that was not just because you happened to be a Union man, but you had a good reason?

Mr. Strayer: I object to that as leading.

Q. What was the reason for not crossing the picket line, [821] because you said you had passed a resolution to that effect, didn't you; that was the first of April; isn't that correct?

A. The first of April.

Q. Why did you pass the resolution?

A. Because we discussed it according to the code of the sawmill organization to respect the picket line.

Q. Was that the reason?

A. That is the reason.

Mr. Roden: All right. That is all.

(Witness excused.)

GORDON S. PETERSON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Paul:

Q. Will you state your name, Mr. Peterson?

A. Gordon S. Peterson.

Q. What is your occupation at the present time?

(Testimony of Gordon S. Peterson.)

A. Fisherman.

Q. Have you ever been a member of the International Woodworkers of America, Local M-271?

A. Yes.

Q. Were you a member of that organization on April 1, 1949—1948, pardon me. [822]

A. Yes.

Q. Did you occupy any position in the Union?

A. I was Financial Secretary.

Q. Were you working at that time, did you have any employment? Were you working for the plaintiff, the Juneau Spruce Corporation?

A. On April 1, 1948?

Q. Yes, or about that time.

A. Yes, I worked for Juneau Spruce.

Q. Do you recall if there was a meeting of I.W.A. Local M-271 on April 1, 1948?

A. Yes, there was.

Q. Were you at that meeting? A. Yes.

Q. Now, I should like to have you tell us who was present just before the meeting began and during the meeting. First, who was present before the I.W.A. meeting began?

A. There was a committee there from the Longshore Local 16.

Q. Can you name them?

A. There was Joe Guy, Orville Wheat, and I believe it was George Ford.

Q. Anyone else of the Longshoremen?

A. That is all I can remember.

(Testimony of Gordon S. Peterson.)

Q. Now, let's make it clear as to whether the Longshoremen were there during the meeting of the I.W.A., or whether [823] they were there at some other time?

A. Well, they were there before the I.W.A. meeting. They left before we started our meeting.

Q. Whom, from I.W.A., was present while the Longshoremen were present?

A. Well, the membership—I wouldn't be able to tell you all the names. I believe Nels Lee was presiding as President and Gustafson was Recording Secretary, and I was Financial Secretary.

Q. About how many I.W.A. members were present while the Longshoremen were there?

A. If I remember correctly, fourteen.

Q. Do you know what the purpose of the meeting was?

A. Well, the Longshoremen were going to have a committee up there to discuss the jurisdiction of loading the barges, and they said that they were going to establish a picket line at the mill.

Q. Did the Longshoremen make any representations or did they say anything at that meeting, just before the meeting began, I mean? A. Yes.

Q. Tell us what they said.

A. Well, they discussed past practice of loading of barges and ships and so forth at the mill.

Q. You mean this mill here? [824] A. Yes.

Q. Did they name any particular employer, like Juneau Lumber Mill?

(Testimony of Gordon S. Peterson.)

A. I believe they named the Juneau Lumber Mills.

Q. What else did they say about past practices?

A. Well, they said according to past practice it was their work and they were entitled to it.

Q. What else? Was any other representations made by the Longshoremen?

A. Well, I don't believe so. I don't believe there was anything else mentioned.

Q. Did they claim to have a contract with the Juneau Spruce Corporation?

A. With Juneau Spruce Corporation?

Q. Yes. A. No, I don't believe so.

Q. Did they mention anything about working for Juneau Spruce Corporation?

A. Yes; they said they had loaded barges and that they could prove it by withholding statements.

Q. Now, I understand from your testimony that the Longshoremen then retired and I.W.A. formally opened its meeting. Is that correct?

A. That is correct.

Q. Was there any discussion among I.W.A. members after the [825] meeting formally opened with regard to the general situation? A. Yes.

Q. How long did the discussion last?

A. Oh, I wouldn't know exactly how long it lasted. There was quite a bit of discussion.

Q. As much as an hour, two hours, three hours? Make an approximation, fairly close.

A. I would say between three-quarters of an hour and an hour.

(Testimony of Gordon S. Peterson.)

Q. And what did you discuss at that meeting? In other words, repeat what was said, as nearly as you can.

A. Well, we discussed—the discussion was whether we should respect the Longshoremen's jurisdiction in loading barges or whether we shouldn't.

Q. Did you talk about what the Longshoremen had said before the meeting began?

A. Yes, that was entered in the discussion.

Q. Was there any talk about the I.W.A. Constitution? A. Yes.

Q. What was said about that?

A. Well, it was discussed, and the Longshoremen before the meeting had started, claimed that it was their work, and somebody got up and said our jurisdiction went from the tree stump to the finished product, and that that was all. [826]

Q. Was any specific reference made to the Constitution or was this just general talk?

A. I believe that was a specific reference to the Constitution. I believe that is the way it reads.

Q. Was there anything said at that meeting by anyone with reference to practices of barge loading or ship loading on the Pacific Coast, meaning Puget Sound or Columbia River?

A. Yes. There was somebody got up and mentioned or explained how it was done in Puget Sound, I believe.

Q. What did he explain?

A. As near as I can remember now, it was that

(Testimony of Gordon S. Peterson.)

the millworkers loaded these small barges on the rivers down there and that they were in turn towed down to the bay where the steamers—where they could get them to the steamers, and from there on the Longshoremen worked them.

Q. Do you know if there was a motion or resolution passed at that meeting of April 1?

A. Yes.

Q. If I showed you Plaintiff's Exhibit No.—or Defendant's Exhibit No. A for identification, well, it is in evidence, do you think you would be able to say whether this motion was or was not passed at that meeting, calling your attention to the upper part of the document?

A. Yes, I believe that is right. [827]

Q. Was it passed at that meeting of April 1?

A. That is right.

Q. Do you know—first, do you know who made the motion or seconded it?

A. I don't believe I would be able to remember that.

Q. Calling your attention to the motion, is there anything omitted from the motion?

A. Anything omitted from the motion?

Q. Which the meeting acted on. I am not talking about the discussion. Was there anything omitted from the motion as stated by the movant and voted on—you know how a motion is made, someone gets up and makes a motion and his words are supposed to be taken down by the Secretary?

(Testimony of Gordon S. Peterson.)

Mr. Banfield: I think the witness ought to be asked what the motion was, rather than what the Secretary took down.

Mr. Andersen: And, if that is the sense of it.

The Court: It is the duty of the Recording Secretary rather than the Financial Secretary to take down the motion made, and this witness testified he is the Financial Secretary.

Mr. Paul: The Recording Secretary is in Los Angeles and beyond this case.

The Court: I am calling attention to the fact that he probably is not the person who took it down, but if he remembers what it was——

Mr. Paul: That is the sense of my question.

Mr. Banfield: My objection is that he shouldn't ask the question in that manner. What it is—ask the witness what it is.

The Court: Will you repeat the question?

Court Reporter: "Which the meeting acted on. I am not talking about the discussion. Was there anything omitted from the motion as stated by the movant and voted on—you know how a motion is made, someone gets up and makes a motion and his words are supposed to be taken down by the Secretary?"

The Court: You may answer if anything was omitted or not, by yes or no.

Q. Was anything omitted by the person who made the motion when the Recording Secretary took it down, if you know?

(Testimony of Gordon S. Peterson.)

A. I would say no.

Q. Was there any communication ever made as to the action of April 1 to the Juneau Spruce Corporation? A. Will you repeat that?

Q. Was any communication made by I.W.A. to Juneau Spruce Corporation; in other words, did you, the I.W.A., notify the Company of its action?

A. There was a discussion on whether to notify them or not.

Q. We are through with the meeting of April 1. We want to know if Juneau Spruce Corporation was notified of the action taken?

A. Like I say, there was discussion as to whether or not to [829] notify the Company of our action at that meeting.

Q. Did you ever get together with the Company on the subject matter of the meeting of April 1, the motion?

A. I just don't remember whether we did or not.

Q. Calling your attention to the date April 7, 1948, was there—— A. Oh——

Q. Go ahead and answer, was there a committee meeting with the Company on that date?

A. Yes.

Q. And who was present?

A. There was a joint committee meeting of the Longshoremen and Local M-271.

Q. Name those who were present.

A. There was, for Local M-271, I was present and Gustafson was present, and for the Longshore-

(Testimony of Gordon S. Peterson.)

men it was Mr. Joe Guy and Orville Wheat, I believe, and for the Company Mr. Hawkins and Dick Stamm.

Q. This was April 7—about what time of the day?

A. As I recall, I think it was supposed to have been eight in the evening.

Q. Just tell us what went on at that meeting, the conversation as nearly as you can remember it.

A. Mr. Gustafson from our Local M-271, was the first one to get up and break into the meeting, and he stated the [830] reason for the meeting which was to get together with all three parties concerned and try to work out some kind of agreement by which there wouldn't be any work stoppage. That was the point of having that meeting with the management of the mill.

Q. State all the conversation that went on.

A. There were introductions went around, I guess to everyone, and Mr. Hawkins wanted to know what they wanted to talk about, and we introduced the Longshoremen as a joint committee with the Woodworkers, and I don't just remember what one of the Longshoremen asked Mr. Hawkins if he wouldn't be willing to set down to negotiate or something like that, and Mr. Hawkins said he didn't have anything to talk about and it got kind of heated around there and I guess I got up and told Mr. Hawkins that the only reason the Woodworkers were there was to try to avoid a work stoppage,

(Testimony of Gordon S. Peterson.)

and we knew he wanted the mill to run as much as we did. He come back and told me why I thought I wanted the mill to run. I told him it was my own personal opinion, because I didn't want to talk for the Union. He said "You have got a hell of an opinion." I think it was Orville Wheat for the Longshoremen asked Mr. Hawkins, then he said "Then you won't negotiate with us and won't talk this thing over?" Mr. Hawkins said he didn't have anything to talk about. [831]

Q. What happened? Have you related all the conversation that you remember now?

A. It got kind of hot between the Longshoremen and Mr. Hawkins and Mr. Gustafson and I just sitting there, because it was more or less they were talking, and Orville Wheat got disgusted I guess, and grabbed his hat and got up and said "There is nothing more to discuss about. We will have to put the picket line around the plant." Mr. Hawkins said "Go ahead and put it around there," he says, "Go ahead and put the picket line around the plant," he says, and he says "We have got all the answers" or something like that. That was about all there was to the meeting. That is the way it ended. We didn't come to any agreement.

Q. Everybody left? A. Yes.

Q. Calling attention to April 9, was there a meeting of Local M-271 on that evening?

A. Yes.

Q. Were you present? A. Yes.

(Testimony of Gordon S. Peterson.)

Q. Who else was present?

A. William Flint was present and Gustafson was again, I believe, Recording Secretary. I was the Financial Secretary, and between a hundred and eighty and two hundred [832] millmen were there that worked at the mill.

Q. Were they members of I.W.A. or part of them?

A. The majority were members of I.W.A. and I believe when the meeting started some of them there had been signed up but were not initiated, and I believe we held an initiation that night for the rest of those members. I wouldn't swear to it; anyway, they were all millmen and they all voted.

Q. Were there any Longshoremen present during the meeting that you know of? A. No.

Q. Would you have known if there were any Longshoremen present? A. Yes.

Q. Were there any Longshoremen present just before the meeting began? A. On April 9?

Q. Yes. A. I don't think so.

Q. What was the discussion about on the meeting of April 9?

A. It was practically the same meeting of April 1, only on April 1 thirteen members voted to respect the Longshoremen's jurisdiction and there was a lot of hub-bub and dissension down at the mill after that, so Nels Lee—they were going to have a meeting of non-Union members on the [833] Northland Dock or some place—Nels Lee finally called

(Testimony of Gordon S. Peterson.)

a meeting in the Union Hall, so everybody attended and the majority of the men, and the majority of the mill workers, could vote on it and there was——

Q. Was there a vote taken?

A. There was a vote taken; yes.

Q. Do you know what the motion was?

A. The motion was whether to respect the Longshoremen's picket line.

Q. If I showed you a copy of a motion, do you think you would be able to recognize it, calling your attention to the bottom part of Defendant's Exhibit A? A. I believe that is it.

Q. Do you think that was the motion passed at that meeting?

A. Yes, that is the motion.

Q. And do you know what the vote was at that meeting? A. Yes; it was unanimous.

Q. Mr. Peterson, going back now to the meeting of April 7, on the part of I.W.A., was there any statement made to Mr. Hawkins or Mr. Stamm as to any of these motions or the first motion, or anything else that I.W.A. had done?

A. In the April 7 meeting?

Q. Yes.

A. Well, I believe that it was said that after the meeting was over and so there wasn't any hopes for negotiations [834] with Mr. Hawkins, I think Gustafson or myself, I don't remember which, told him that we would have to respect the I.L.W.U. picket line, if it was thrown around the plant.

(Testimony of Gordon S. Peterson.)

Q. Was that the only statement given to Mr. Hawkins? I am asking if the Company was informed of a definite action having already been taken by I.W.A.

A. That was the information of the action of April 1, that we voted to respect their picket line.

Q. Did you tell Mr. Hawkins?

A. On the seventh?

Q. Yes.

A. Yes; he was told on the seventh.

Q. Can you repeat as nearly as possible the words spoken?

A. I can't remember exactly, but to the effect that the Woodworkers would have to respect the picket line if it was thrown around the plant. It hadn't been thrown around the plant yet.

Q. On the meeting of April 9, do you know what time was that held?

A. I believe it was held right after the day shift got off shift, so that the Company was going to give the night shift time to go to the meeting, so I believe it was held right after the day shift. It may have been seven o'clock, between five and seven it started. [835]

Q. The Company was going to give time off for the night shift so the night shift could attend the meeting? A. Yes.

Q. Do you know whether the Company ever gave time off?

Mr. Strayer: It is immaterial. There is no dis-

(Testimony of Gordon S. Peterson.)

pute that the night shift was delayed an hour so the meeting could be held.

The Court: If it is not disputed——

Mr. Andersen: The Company testified that the men took the time off, but they all made it up the next morning. The Company testified to that. I think this witness will testify slightly different than that. After the meeting April 7 decided to respect the jurisdiction of the Longshoremen in loading barges, then it was at that time the Company changed its mind and said, "You voted not to go to work, now make it up," or words to that effect.

Mr. Strayer: I don't see how that is material.

The Court: I don't either.

Mr. Paul: It goes to the credibility of Mr. Hawkins, affecting his credibility.

The Court: Objection overruled.

Q. Do you know whether the Company ever did give the night shift time off or whether they had to make it up later on?

A. They were supposed to—the Company agreed—— [836]

Mr. Strayer: I object. I have no objection to conversation, but not a conclusion of what somebody was supposed to do.

The Court: He should answer that yes or no.

A. The question again?

Mr. Paul: As I stated it, he can't answer yes or no.

The Court: Will you repeat the question?

Court Reporter: "Do you know whether the

(Testimony of Gordon S. Peterson.)

Company ever did give the night shift time off or whether they had to make it up later on?"

The Court: Why couldn't he answer that at least that he knows?

Q. Do you know? A. Yes, I know.

Q. What do you know?

A. They had to make it up the next morning.

Mr. Andersen: May I ask one question?

The Court: Yes.

Mr. Andersen: After your meeting April 1 where you voted to respect the jurisdiction of the Longshoremen, you had a meeting with Mr. Hawkins of the Juneau Lumber—Juneau Spruce Company on April 7; that is correct, is it?

A. Yes.

Mr. Andersen: At that meeting, did you advise Mr. Hawkins of the meeting, of the action that your Union had [837] taken?

Mr. Strayer: That has already been gone into.

The Court: He testified that they did.

Mr. Andersen: The question I was going to ask was if they advised him of the action of the meeting April 1; I didn't think it had been answered. Thank you, sir.

Mr. Paul: That is all.

Cross-Examination

By Mr. Banfield:

Q. Mr. Peterson, when did you first start work at the Juneau Spruce Corporation?

A. August 14, 1947.

(Testimony of Gordon S. Peterson.)

Q. You were there at the time the I.W.A. made a contract with the Juneau Spruce Corporation on November 3, 1947, weren't you?

A. Well,—just a minute. Did I say 1947? August 14, 1947?

Q. Yes.

The Court: Yes.

Q. The strike was in April, 1948; maybe that will orient you.

A. I was there August 14, 1947.

Q. You were there, working at the plant, at the time the I.W.A. made a contract with the Juneau Spruce Corporation to be the exclusive bargaining agency for the Corporation, were you not? [838]

A. That contract was made before I was there, wasn't it? You mean the agreement we work under today?

Q. It was signed November 3 of 1947. It had been negotiated—parts of it—from time to time before that, but it was signed on that date.

Mr. Paul: I object to this line of questioning.

Mr. Banfield: What I want to know is how long he was there.

The Court: Objection overruled.

Q. Did you work continuously from August 14, 1947, to October, 1948? A. Yes.

Q. You were there when the barge was loaded in October?

A. I am not too familiar with the barge loading. My job is at the head end of the mill.

Q. But you were employed there?

(Testimony of Gordon S. Peterson.)

A. I was employed there.

Q. You knew the barge was being loaded?

A. Yes; I knew there was a barge out there being loaded.

Mr. Paul: I think I will renew my objection. It is improper cross-examination. Counsel stated he was asking the question for the purpose of learning how long he worked there, and dragging in all the rest of this is not properly reflecting that, if that is what he wants to know. I think the question has been asked and answered. [839]

The Court: Didn't he testify on direct with reference to barge loading?

Mr. Paul: Yes; he said April 1 barge loading was discussed. The cross-examination is limited to the discussion referring to past practice of barge loading.

The Court: That would depend what he testified to as past practice. If he testified to anything with regard to past practice as to barge loading, the cross-examination wouldn't be limited to a discussion of the meeting, as far as barge loading is concerned. I don't remember the extent to which he testified with reference to the practice of barge loading. If mention of it merely came in incidentally at the meeting, why of course it would be improper cross-examination.

Mr. Banfield: If the Court please, I can state what the testimony was and what I am trying to get at. The testimony was that the Longshoremen stated they had done barge loading, and after that

(Testimony of Gordon S. Peterson.)

representation the I.W.A. took action. What I am trying to get at is why they took the action, why this witness took that action in spite of the fact that he knew that it had not been past practice.

Mr. Paul: I will withdraw the objection.

The Court: Proceed.

Q. You knew another barge was loaded after the one in October, didn't you? A. Yes. [840]

Q. And you knew there was one loaded early in April? A. Yes.

Q. And the Longshoremen represented that they had done all the barge loading at this plant, is that correct? A. Of that type; yes.

Q. You said they presented you with some withholding slips. Did they have withholding slips dated later than October 7, 1947?

A. They didn't present me with any withholding slips. They merely stated they could. I don't know when they gave it to them.

Q. Did they show you any contract with the Juneau Lumber Mill? A. No.

Q. Did they state that they could?

A. They said they had an agreement with the Juneau Lumber Mill.

Q. But they didn't show it to you?

A. No.

Q. Did they say this agreement carried over to the new Company?

A. I believe they did.

Q. Did they show you anything in writing to that effect? A. No.

(Testimony of Gordon S. Peterson.)

Q. Did they tell you that they had been certified by the [841] National Labor Relations Board for this work?

A. No, they never said anything like that.

Q. You don't remember that? Now, Mr. Peterson, you voted on this motion, did you not?

A. What motion?

Q. With respect to the picket line.

A. Yes.

Q. How did you vote on that?

A. It was a secret ballot.

Q. How did you vote on it?

A. Am I required to answer that?

The Court: I guess you are.

A. I voted to respect the picket line.

Q. And thirteen others did, too?

A. One didn't.

Q. Wasn't this a standing vote? A. No.

Q. Are you sure? You don't remember that thirteen men stood up and one man sat down—you don't remember that?

A. I wouldn't be sure of that, but I was under the impression that it was a secret ballot.

Q. What was your impression of voting to respect the picket line?

A. I am a Union man and I don't like to go through a picket line. [842]

Q. There is kind of an unwritten law that no Union will go through the picket line of another Union; is that true?

(Testimony of Gordon S. Peterson.)

A. Well, yes; in a sense it is an unwritten law, and I believe it wasn't our work in the first place, and always have. I believe everybody knows that.

Q. You knew the Company's contract of November 3 had a provision in it that they were not required to go through a picket line?

A. Yes.

Q. Therefore, the Company couldn't call it a violation of the contract? A. No.

Q. Why is it that you find these picket lines so sacred, you wouldn't go through it whether it was legal or not legal?

Mr. Andersen: I object to that as argumentative.

The Court: Yes; objection sustained.

Q. Why did you not go through the picket line?

A. I believe it is a legitimate picket line and I believe it is the Longshoremen's work, is the reason.

Q. No other reason? A. No.

Q. Do you remember the meeting in the City Hall and remember Mr. Roden was the referee?

A. Yes.

Q. It was to determine whether or not you were to have [843] Unemployment Compensation checks?

A. Yes.

Q. Do you remember you were sworn at that time to testify? A. Yes.

Q. Let me ask if at that time you were asked this question and you answered "Why did you with-

(Testimony of Gordon S. Peterson.)

draw your labor? There is no dispute existing between your organization and the Juneau Spruce Corporation?" You said "No." "Why did you withdraw your labor?" That question was asked by Mr. Burtz. Your reply was "As far as I a concerned, fear of reprisal or even bodily harm for attempting to go through the thing set up there now, and which might even be reflected on our children in years to come. I don't feel that I can go through a picket line of that nature for that reason." Did you so answer that question?

A. I believe I did.

Q. Mr. Burtz asked you "Do you think it would be dangerous?" Do you remember your answer to that? A. I don't remember.

Q. Let me refresh your memory. Did you answer that question "I wouldn't want to take the chance myself. I think it would be dangerous."

A. I believe it would, possibly.

Q. Now, the question was asked of you as to what was the policy of the I.W.A. at that time. In other words, why [844] it was that the organization decided to respect this picket line. Do you know now what the reason was, why the I.W.A. respected the picket line?

A. They respected the picket line. Why they respected the picket line?

Q. Yes.

A. They respected—the I.W.A. policy?

Q. Yes. Why did the organization decide to respect the picket line?

(Testimony of Gordon S. Peterson.)

A. You mean Local M-271?

Q. Yes.

A. Because they figured it was the Longshoremen's work.

Q. No other reason?

A. Well, they figured it was a legitimate picket line and that it was the Longshoremen's picket line.

Q. And that they couldn't go through the picket line, isn't that true, that you just don't do such things—isn't that the reason?

A. It just depends upon the picket line.

Q. It depends upon the picket line. Do you remember you attended a hearing before Mr. Melton Boyd on September 23, 1948, in the Senate Chambers of this building, at which you were sworn to testify; do you remember that? A. Yes.

Q. Do you remember that you were sworn to tell the truth? A. Yes. [845]

Q. Now, at that time Mr. Boyd was questioning you and he said this "Now in order that I may fairly appraise your answers, is it your position that Local M-271, by its action, was intending to and it was its avowed purpose to establish the jurisdiction of Local 16, or was its purpose to respect the picket line to permit Local 16 to establish its own jurisdiction?" Do you remember what you answered to that?

A. No, I don't recall how I answered.

Q. I will ask you the same question now and

(Testimony of Gordon S. Peterson.)

see how you answer it. Mr. Peterson, is it your position that Local M-271, by its action, was intending to and it was its avowed purpose to establish the jurisdiction of Local 16, or was its purpose to respect the picket line to permit Local 16 to establish its own jurisdiction?

Mr. Andersen: May it please the Court, I am going to object to the manner in which the questioning is being done. I think the rule is to show the questions and answers to the witness.

Mr. Banfield: I will, if he requests it.

Mr. Andersen: We usually make the request.

Mr. Banfield: Go ahead.

Mr. Andersen: Do you think I am objecting to hear myself talk? May it please the Court, I think the Court [846] understands the purport of what is occurring.

The Court: If the witness is questioned from anything in writing, the rule is that it must be shown to him. Counsel get around that by asking a question in writing without informing the witness it is in writing.

Mr. Andersen: When I tried on cross-examination the Court——

The Court: I haven't ruled yet. In this case it appears that the examination was asked from the record, therefore I think it would be within the rule.

Mr. Andersen: What page is it, counsel?

Mr. Banfield: Page 506 of the record.

(Testimony of Gordon S. Peterson.)

(Whereupon counsel for the plaintiff showed a document to the witness on the stand.)

Mr. Andersen: What lines do you refer to, Mr. Banfield?

Mr. Banfield: They aren't numbered, but it is about halfway down the page.

Q. Now, Mr. Peterson, which was it? What was the purpose of M-271? Was the purpose to establish the jurisdiction for the Longshoremen or to let them try and do it themselves?

Mr. Andersen: May it please the Court, I am going to object to that, so far as this document is concerned. If the purpose is to impeach the witness, if that is the purpose [847] of this thing——

Mr. Banfield: No.

Mr. Andersen: May I finish my statement, please?

Mr. Banfield: Yes.

Mr. Andersen: If it is to establish the fact, as counsel puts it, then what he testified on the sixth is immaterial, unless he wishes it for impeachment purposes. Apparently he doesn't want it for impeachment. What is contained on page 506 of this record becomes immaterial unless it is for impeachment.

The Court: I have forgotten the question. Read the question.

Court Reporter: "Now, Mr. Peterson, which was it? What was the purpose of M-271? Was the purpose to establish the jurisdiction for the Long-

(Testimony of Gordon S. Peterson.)

shoremen or to let them try and do it themselves?"

The Court: Objection overruled.

Mr. Andersen: I am going to make the further objection, may it please the Court, that it simply calls for a conclusion and opinion of the witness. I will withdraw the objection and stipulate he may read the page if he wishes.

Q. Go ahead.

A. I wonder if you would state that over again?

Q. What was the purpose of M-271 in taking this action to respect the picket line? Was its purpose to establish the [848] jurisdiction of Local 16 or to allow Local 16 to deal with the Company and establish its own jurisdiction?

Mr. Andersen: May it please the Court, that assumes something that isn't in evidence and is not proper cross-examination. This witness isn't required to say there was a purpose. The record shows there may have been several purposes that M-271 voted to respect the jurisdiction of the Longshoremen. The record shows several.

The Court: It is legitimate cross-examination. Objection overruled.

Mr. Andersen: I think it is improper when there are several reasons to make the witness say there is only one.

The Court: He isn't compelled to answer that there is one.

Mr. Andersen: I submit the question does. That is why I object to the form of the question.

(Testimony of Gordon S. Peterson.)

The Court: Objection overruled.

Q. What purpose was it?

A. Well, it was the purpose to let the Longshoremen establish their own jurisdiction. We wanted to stay out of the trouble.

Q. That is why——

Mr. Andersen: Have you finished your answer, sir?

A. Yes.

Q. All right. Now, Mr. Peterson, did you testify as follows [849] at the National Labor Relations Board hearing——

Mr. Andersen: Again I make an objection.

Q. "We just did not want to dispute with them. In order not to dispute with them we would not cross their picket line. That is my idea of it."?

Mr. Andersen: I should think counsel would stop talking while I am objecting.

Mr. Banfield: If you wait for me to finish the question——

Mr. Andersen: I suggest that counsel, before he reads stuff, show it to the witness, and maybe we can get along.

The Court: The witness wouldn't know what he was talking about if he didn't state the question first.

Mr. Andersen: All he has to do is hand it to him.

The Court: Whether he points with his finger or states it—there is one of two methods.

(Testimony of Gordon S. Peterson.)

Mr. Andersen: What page do you refer to? The same page? I will stipulate he can read it.

Q. Was that your testimony, Mr. Peterson?

A. Yes, that was my testimony.

Q. What was your answer? Was that the way you testified? A. Yes.

The Court: I don't think it appears in the record even what the question was. [850]

Mr. Banfield: I don't believe it does, after all that.

The Court: I think the jury is entitled to know what it is.

Mr. Banfield: The question was, Mr. Peterson, did you testify at the National Labor Relations Board hearing "We just did not want to dispute with them. In order not to dispute with them we would not cross their picket line. That is my idea of it."

A. Yes, it is there.

Q. Is it also true that at that hearing you testified as follows——

Mr. Andersen: What page, counsel?

Q. 509. Question: "All right. But you were willing that the Company hire Longshoremen to do the work if it would avoid trouble." And was your answer to that question "Yes"? A. Yes.

Q. Now, Mr. Peterson, isn't it a fact that M-271 took this action because they knew that it would be a reflection on them if they went through a picket line and because they were willing to let the Longshoremen establish their own jurisdiction?

(Testimony of Gordon S. Peterson.)

Mr. Andersen: I am going to object to that question as complex. There are two questions in the one question.

Mr. Banfield: I shall withdraw the question.

Q. Mr. Peterson, isn't it a fact that Local M-271 took this action first because as Union men they knew that there would be a reflection on them if they crossed the picket line?

A. Well, that would be one reason; yes—not the only one.

Q. And another reason was that they were afraid that there might be trouble? Is that right?

Mr. Andersen: I am going to object to the question as indefinite.

The Court: It is rather indefinite, but it is cross-examination. If the witness finds it too indefinite he can say that.

Q. Wasn't that the reason?

A. Will you state it again?

Q. Did not M-271 take the action to respect the picket line partly because they felt there would be trouble?

A. Yes, partly because they thought there would be trouble.

Q. And partly because the Longshoremen represented they had a contract with Juneau Spruce that carried over from Juneau Lumber Mills; isn't that right?

A. I wouldn't say exactly that. It was past practice and we felt it was their work.

(Testimony of Gordon S. Peterson.)

Q. You felt it was their work? A. Yes.

Q. Because they said so? [852] A. No.

Q. Did you feel that employees have a right to tell the employer who he is to hire? Is that one of your reasons? A. No.

Mr. Andersen: I object to that as argumentative.

The Court: What was that question?

Court Reporter: "Did you feel that employees have a right to tell the employer who he is to hire? Is that one of your reasons?"

A. No.

Q. You don't think then that it would be proper for the Longshoremen's Union to go down to the Company and demand they be assigned to certain work assigned to somebody else?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness. It is improper cross-examination and argument, may it please the Court.

Mr. Banfield: If the Court please, I am trying to get to the basis of why they refused to go through the picket line.

The Court: Will you repeat the question?

Court Reporter: "You don't think then that it would be proper for the Longshoremen's Union to go down to the Company and demand they be assigned to certain work assigned to somebody else?"

The Court: I think an opinion of the witness on [853] that is immaterial. Objection sustained.

(Testimony of Gordon S. Peterson.)

Mr. Peterson, you said this was legitimate longshore work, didn't you?

A. That is what I feel it is; yes.

Q. By what right do you feel they have a right to do this work?

Mr. Andersen: That is only argument, may it please the Court.

The Court: Well, it seems to me it is somewhat like the previous question. It involves the personal opinion of the witness rather than takes in what the I.W.A. did or acted on.

Mr. Strayer: The only thing is, he testified that one of the reasons they decided to respect the picket line was because it was their belief the Longshoremen were entitled to the work. It seems to me we are entitled to develop the reasons for that belief.

The Court: I am wondering about the propriety. Repeat the last question.

Court Reporter: "By what right do you feel they have a right to do this work?"

The Court: Well, perhaps it is proper in view of his answers. Objection overruled.

Q. Look over here, Mr. Peterson——

Mr. Andersen: I guess he got that habit from your [854] witnesses, counsel.

A. I feel—this is my personal opinion—I feel it is the Longshoremen's work in view of the fact that they were ocean-going scows or barges. They were intending to send them out of Alaska to Canada and the United States, which is interstate commerce, and

(Testimony of Gordon S. Peterson.)

I believe it states somewhere in the Longshoremen's Constitution that anything pertaining to interstate commerce belongs to them.

Q. You think if they put a provision in their Constitution that means the employer must do it?

Mr. Andersen: I object.

Q. Do you believe that the Juneau Spruce Corporation should have the right to hire you to do that work?

Mr. Andersen: Just a moment. I object. It is argumentative.

The Court: I think the objection will be sustained.

Q. On what does this belief that they are entitled to the work rest?

Mr. Andersen: I object to that as calling for a conclusion and opinion of the witness.

The Court: Objection overruled.

A. What was the question again?

Q. You stated, Mr. Peterson, you felt the Longshoremen had a right to this work?

A. Yes. [855]

Q. Where does this right come from?

Mr. Andersen: I submit, the question has been asked and answered several times. The witness just stated he felt it belonged to them, it was his personal opinion, because it was ocean-going cargo.

The Court: Objection overruled.

Q. What is this right based on?

A. Well, longshoremen are longshoremen, and

(Testimony of Gordon S. Peterson.)

they have—their work consists of loading or unloading ships or barges or anything like that that has to do with work from the bullrail out. I couldn't be technical on it.

Q. You feel that only members of Local 16 should be permitted to do that work in Juneau?

Mr. Andersen: I object to that as calling for an opinion and conclusion of the witness.

The Court: Objection overruled.

A. I feel that it isn't our work, it isn't the Woodworkers' work.

Q. Do you feel an employer has a right to hire men and assign them to that job?

Mr. Andersen: That is argumentative, may it please the Court, and calls for a conclusion and opinion of the witness.

The Court: Yes; I think so.

Q. Have you done any longshore work in Juneau? [856]

Mr. Andersen: I object to that as improper cross-examination.

The Court: Objection overruled.

A. I worked one boat, I believe.

Q. One boat? A. Yes.

Q. When was that?

A. I don't remember exactly.

Q. Since the strike occurred? A. Yes.

Q. Mr. Peterson, isn't it a fact that when the Longshoremen were associating with the I.W.A. immediately prior to the time the picket line was established, they promised the I.W.A. men, if they

(Testimony of Gordon S. Peterson.)

were out of work, they would put them on as extra men longshoring?

A. That if any of the I.W.A. men were out of work that they would put them extra?

Q. Didn't they promise the I.W.A. men if they were out of work they would put them on as extra men longshoring during the period of the strike?

A. They said they would help them all they could.

Q. Was that the kind of help they indicated they would give?

A. What kind of help is that?

Q. By allowing them work as extra men for the steamship companies? Was that the kind of help and work they offered [857] to give you?

A. Yes.

Q. Isn't it a fact you were the only I.W.A. man who ever got extra work there? You were the only one? A. No.

Mr. Andersen: I object.

The Court: Objection overruled.

Q. What others?

A. I wouldn't be able to say all of the others, but I know I am not the only one.

Q. You don't know the names? A. No.

Q. And you worked on only one boat?

A. I could have had more. I went to work for the Duck Creek Logging Company in the mill.

Q. The Longshoremen would have kept you on longshoring?

(Testimony of Gordon S. Peterson.)

A. I don't know, I have to take my turn.

Q. You go on the wheel and rotate with them, isn't that true? A. Yes, I imagine.

Q. Any time your name got to the top of the list you would be put on there, wouldn't you?

Mr. Andersen: That is only argumentative.

Mr. Banfield: I am showing the witness's interest, may it please the Court.

The Court: Objection overruled.

Q. Isn't it true? [858]

A. I believe that is the way they were working it.

(Whereupon the jury was duly admonished and Court adjourned until two o'clock p.m. May 10, 1949, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon the witness Gordon S. Peterson resumed the witness stand and the cross-examination by Mr. Banfield was continued as follows:)

Q. Mr. Peterson, how many meetings did you have with the representatives of the Company between April the first and the time the picket line went on?

A. With the representatives of the Company?

Q. Yes. A. Just one, that I know of.

Q. Was there a meeting that you attended immediately before the picket line went on, that is the day before—were you present at a meeting?

A. A meeting with the Company?

Q. Yes.

(Testimony of Gordon S. Peterson.)

A. I don't recall any meeting the day before the picket line.

Q. Maybe this will refresh your memory. There has been testimony here from several witnesses that a meeting was held in which Mr. Hawkins was present and representatives of Local 16 and Local M-271, and they have been to the effect that this meeting was on April 9, the day before the strike. Your testimony this morning was, as I remember it, that there was a meeting on the evening of the seventh or the eighth?

A. As near as I can remember it was in the evening of the seventh; at least we asked for a meeting in the evening.

Q. Could it be the other, which was testified to by the others, in the daytime around noon on the ninth and at which they discussed having another meeting that night?

A. I wasn't present at it, if there was such a meeting. I don't recall any such a meeting.

Q. Were there members of the Longshoremen's Union present, which you think was the meeting of the seventh or eighth? A. The seventh; yes.

Q. Do you remember which ones they were?

A. Orville Wheat and Joe Guy.

Q. Well, do you know whether or not there was another meeting on the seventh?

A. I don't recall any meeting—with the Company, you mean?

Q. Yes, in the Company office, with Mr. Hawkins and Mr. Stamm.

(Testimony of Gordon S. Peterson.)

A. No, the only meeting I know of on the ninth was our meeting in the Union Hall.

Q. Were you present when they asked Mr. Hawkins if they could use the drying shed for a meeting?

A. No, but I heard they were trying to get a meeting in the dry shed on the Northland Dock.

Q. Then it was decided later to hold it in the Union Hall? [860] A. Yes.

Q. And it was held in the Union Hall, was it not? A. Yes.

Q. On this meeting, you stated that you went there with another representative of M-271 and representatives of the Longshoremen's Union and a representative of the Company. Did Mr. Hawkins tell you at that time that his Company had an agreement with M-271 which made it the exclusive bargaining agent for all the workers?

A. I don't remember for sure whether he said they had an exclusive bargaining agreement with M-271 or not, but he mentioned something—he always did imply that we were the sole bargaining agent for that work, but it was never written into the contract.

Q. It never was written into the contract?

A. No.

Q. Do you remember at that meeting that he told you that he insisted upon the I.W.A. men doing this work because it was in the contract?

A. Because what?

(Testimony of Gordon S. Peterson.)

Q. Because it was in the contract.

A. No, I don't recall anything like that.

Q. Do you remember him stating that he did not have any contract with the Longshoremen?

A. No, I wouldn't say he said that. He said he wouldn't have [861] anything to do with the Longshoremen.

Q. Wasn't that after he had told you that he had no contract with them, but did have one with the I.W.A.?

A. No; he didn't say anything like that.

Q. In other words, you don't know what was said first, and what was said afterwards?

A. I don't get you.

Q. You don't know the order in which these various points were brought up?

A. Yes, I think I know most of them.

Q. Tell us what was said when the conversation opened, after the introductions.

A. In the meeting with the Longshoremen and the Company?

Q. Yes. A. On the seventh?

Q. Yes.

A. Well, like I said before, I think Gustafson was the first one to say anything and he stated why we were all there, that in order to avoid a work stoppage and like you say, the introductions were first, and Mr. Hawkins knew that they were Longshoremen and he let us in and we met and Gustafson explained that we were there to try to come to some agreement by which the mill could continue

(Testimony of Gordon S. Peterson.)

operations, while they settled whatever differences there were with the Longshoremen, and all we were interested in was keeping [862] the mill running.

Q. The I.W.A. men sat back and let the Company and the Longshoremen do the talking?

A. After that initial introduction, like I told you before, it got pretty hot between Mr. Hawkins and somewhere in that heated argument between the Longshoremen and Mr. Hawkins, like I stated before—the only recourse of the Woodworkers was to prevent a work stoppage, so our members could work, and for the benefit of the community—I don't know what all.

Q. How long were you in this meeting?

A. Not very long, I would say a minute—oh, I wouldn't—I would say three-quarters of an hour probably, altogether.

Q. There was quite a bit of discussion?

A. Quite a bit of discussion.

Q. Quite a bit of discussion before there was any heated discussion, isn't that true?

A. Well, when Gustafson opened the meeting and stated why we were there and that he wanted—I can't recall his exact words—but something to the effect that we didn't want to see the mill shut down, and we would like to see them negotiate, sit down in good faith and negotiate with the Longshoremen because we didn't figure they even knew what they really did want. There were a lot of rumors around. He wouldn't sit and talk. He told

(Testimony of Gordon S. Peterson.)

the Longshoremen [863] that were there he didn't have anything to talk about.

Q. In so many words—nothing he wanted to talk to them about? A. That is right.

Q. As a matter, you were there about half an hour before there was any exchange of words in an antagonistic manner?

A. I couldn't say exactly. It wouldn't be over a half hour.

Q. This flare-up came at the end, isn't that true?

A. Yes; it kept building up toward the end.

Q. The Longshoremen kept insisting they be hired, isn't that true?

A. At that time all the Longshoremen were insisting upon at that meeting would be to sit down and talk the thing over with them, negotiate in good faith, both parties, in order to avoid a work stoppage. He kept insisting he didn't have anything to talk about.

Q. And he didn't want to negotiate with them?

A. That is right.

Mr. Banfield: That is all.

Mr. Andersen: That is all. Thank you, Mr. Peterson.

(Witness excused.) [864]

GLEN JAMES KIRKHAM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Andersen:

Q. What is your name, sir?

A. Glen James Kirkham.

Q. I understand you are the son of Mr. Kirkham who testified here the other day?

A. Yes, sir.

Q. Have you been employed at the Juneau Spruce Corporation?

A. I was employed, yes.

Q. How long were you employed?

A. Oh, from just before the Spruce took over up until the time of the strike.

Q. Up until the time of the strike. Were you there during the time Mr. Hawkins was there?

A. Yes, I was there when he came up.

Q. I assume that sometime during the time that you were there there was negotiations? By the way, you belonged to the I.W.A. there, didn't you?

A. I did.

Q. Were you aware of the fact that sometime after Mr. Hawkins arrived there were negotiations of some kind pending between your Union, the Woodworkers, and the Juneau Spruce Corporation? [865] A. Yes, there was.

Q. During that time do you recall having a conversation with Mr. Hawkins regarding Unions and

(Testimony of Glen James Kirkham.)

Union contracts in general? Do you recall such a conversation?

A. Yes. We had that out a few times right on the job.

Q. Right on the job?

A. And a few times when a man would talk about the Union he made a statement that he was going to bust all the Unions because he didn't believe in them.

Q. Mr. Hawkins? A. Yes.

Q. And who was present?

A. I believe my Dad was President of the Union.

Q. Who was present at that time?

A. I wouldn't know the exact time, but it was out in the yard it happened.

Q. Could you tell about what time it was?

A. I would say about a month after he got there.

Q. About a month after he got there, he said he was going to bust the Unions?

A. He said he was going to bust our Union up and didn't believe in Unions.

Mr. Banfield: He started with a conversation; now he makes reference to what they told him. I would like to know if it is hearsay. [866]

Q. At this time you mentioned, about a month after Mr. Hawkins arrived, did you hear Mr. Hawkins personally say that? A. Yes.

Q. And he said he was going to break every Union in Juneau?

(Testimony of Glen James Kirkham.)

Mr. Banfield: That is leading and suggestive, and not what the witness testified.

Q. Again, state what Mr. Hawkins at that time said.

A. He merely stated he didn't believe in Unions and that he was going to break our Union.

Q. Did he refer to any other?

A. He said any unions that came in contact with him.

Mr. Andersen: You may cross-examine.

Cross-Examination

By Mr. Banfield:

Q. Where did that conversation occur?

A. Down at the Juneau Spruce Yard.

Q. What part? A. The back part.

Q. The back part, what we call——

A. The rear part, back where the warehouse and machine shop is, where we stack the lumber.

Q. And who was present at the time?

A. There was Hawkins and his brother-in-law, the younger one— [867] I don't remember his name—and there was one other fellow—I don't remember his name for sure—he was there about a week, and he was the one that was having the trouble.

Q. Were you there for the whole conversation or just part?

A. I was there at the beginning. I was Steward for the Woodworkers' Union and he came to me

(Testimony of Glen James Kirkham.)

about some trouble he had been having about wages.

Q. And the man and you were taking it up with Mr. Hawkins?

A. Yes, taking it up with Mr. Hawkins.

Q. Were you ever on any negotiating committees with Mr. Hawkins? A. No.

Q. You say you were Shop Steward?

A. Yes.

Q. You weren't in on various conversations with Mr. Hawkins from time to time, were you?

A. No.

Q. Do you know for a fact Mr. Hawkins dealt with the Shop Committee from time to time on numerous problems?

A. I don't know anything about it.

Q. All you know is one conversation?

A. This man was in my department.

Q. Do you know what time of year it was?

A. I know it was about a month after he got there, it would [868] be in about May or June.

Q. Somewhere around the first of June?

A. Somewheres around in there.

Q. Do you remember the name of the man who made this statement? A. Not that one.

Q. You don't know the one you were representing? A. No.

Q. You don't know the name of the other man, the man's name besides Mr. Hawkins?

A. One of Hawkin's brothers-in-law, I believe his name is Frank.

(Testimony of Glen James Kirkham.)

Q. What Union did you belong to then?

A. The Woodworkers'.

Q. You were Shop Steward for M-271?

A. Yes.

Mr. Banfield: That is all.

Mr. Andersen: That is all. Thank you.

(Witness excused.)

Mr. Banfield: If the Court please, I move the testimony of the witness be stricken as entirely immaterial.

The Court: I don't see its materiality.

Mr. Banfield: I move it be sticken from the record.

Mr. Andersen: May I state the purpose for the record?

The Court: Yes. [869]

Mr. Andersen: We called young Mr. Kirkham to the stand to testify to the animus existing between Mr. Hawkins and the Longshore Union in particular, or any Union in general. That was the purpose of it. Now, evidence has been introduced that Mr. Hawkins didn't want to do business with the Longshore Union because the Company had a contract with—that is, the Juneau Spruce Mill—had a contract with the I.W.A. Part of our position is that Mr. Hawkins didn't want to do business with the Longshore Union and we will have another witness who will quote Mr. Hawkins as saying he would close his plant before he would do business with the Longshore Union. It goes to the

animus and complete bad faith in refusing to negotiate.

The Court: But how are negotiations involved here? How are they material here?

Mr. Andersen: Under the allegations of the complaint, may it please the Court, they talk about—they accuse this Union, Local 16, of inducement and coercion regarding this so-called jurisdictional strike. That is the ultimate of their case. We are refuting it by showing there was no such interest, no such coercion. Conversely, so far as the Company is concerned, one witness will quote Mr. Hawkins as saying "We will close down this plant before we will do business with the Longshoremen." That goes, as I see it, to an important aspect of the case. [870]

Mr. Banfield: If the Court please, the allegations in the complaint are that this defendant, both defendants, have by strike and by refusing to work for other employers, have induced and encouraged the members of M-271 not to work and the object was to get the work for themselves. What difference does it make what Mr. Hawkins' attitude was in this? It has nothing to do with it. It is a case of, if they did induce the men not to work or not. They haven't set up a defense that M-271 didn't go through the picket line, because they didn't like Mr. Hawkins, or some other method. It is simply a case of where they are trying to describe Mr. Hawkins in some way that has nothing to do with the issues in the case.

Mr. Andersen: With respect to the matter of

pleading, your Honor, I don't believe it is necessary to plead affirmative defense. We simply meet the issues as framed by the plaintiff, affirmative proof under the issues as framed. Mr. Banfield may have one idea about this case. We certainly have different ideas. We take the positions here that Mr. Hawkins, the Manager of the Company and spokesman in Juneau, if he goes so far as to say "We will close this mill before we do business with the Longshoremen," it goes to the question of good faith so far as the employer is concerned and liability to negotiate in good faith under the Taft-Hartley Act, and, if the Court please, credibility of Mr. Hawkins, in so far as it shows animus [871] towards this Union and all Unions in general. We think it is very proper, for those purposes, and within the issues as framed.

The Court: I don't think it is relevant to any material issue. The testimony will be stricken.

ERLAND PEARSON

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Andersen:

Q. What is your name, sir?

A. Erland Pearson.

Q. You are a longshoremen, of course?

A. Yes, sir.

Q. And you are presently President of Local 16? A. Yes, sir.

(Testimony of Erland Pearson.)

Q. The Longshore Union, defendant here?

A. Correct.

Q. How long have you been President of this Local 16?

A. Since the first part of July, 1948.

Q. And how long were you a member of this Union prior to that time?

A. I joined Local 16 in October of 1947.

Q. From the time you first became a member of the Union, did you take an active part in its affairs? [872] A. I certainly did.

Q. And since you became President, you have exercised that office, have you? A. Correct.

Q. From the time you first became President of this Union, Mr. Pearson, and prior to the time you were and while a member of the Union, what was the attitude of the Union in relation to willingness to arbitrate this dispute?

A. Local 16 has at all times——

Mr. Banfield: I object. Willingness to arbitrate hasn't anything to do with this case. This employer can't be forced to hire persons because somebody else is willing to submit to arbitration. Under the circumstances, any arbitration means that an employer's rights could be taken away from him.

The Court: I don't see where the necessity of arbitrating anything has anything to do with this case.

Mr. Andersen: May it please the Court, Mr. Banfield through Mr. Flint put in lots of evidence and particularly on cross-examination there was

(Testimony of Erland Pearson.)

lots of evidence, and also it came out on direct examination in relation to arbitration. Your Honor will recall I examined Mr. Flint at length, proper cross-examination, regarding meetings, what was said, and arbitration.

The Court: I remember your examination. I do not [873] recall any testimony of the necessity of arbitrating in Mr. Flint's testimony on direct examination.

Mr. Andersen: Otherwise I am sure I wouldn't have been able to cross-examine on the subject, and I was. Your Honor will recall Mr. Flint was somewhat confused at the difference between arbitration and negotiation. He was examined at length regarding it. We offered the testimony in refutation of Mr. Flint's testimony, and also, may it please the Court, under the pleadings and the issues as framed, particularly as in the Taft-Hartley Act where the sections refer to conciliation where the employer exercises good faith under the provision for conciliation and mediation, that labor disputes be not unnecessarily prolonged but amicably adjusted under the Taft-Hartley Act itself. It is our position, and always has been, that the good faith of the employer here is definitely in issue. This testimony also goes to the further fact that the contract, the longshore hiring contract put in evidence through Mr. Schmidt, which Local 16 contends—and is a fact—carried over from the Juneau Lumber to the Juneau Spruce. There is an arbitration

(Testimony of Erland Pearson.)

clause in that contract and if the Union is willing to arbitrate we have a right to put it in issue. All those contracts have that clause and the contract adopted by the Juneau Spruce Corporation from the Juneau Lumber, when the alleged dispute arose—we take the position, and I will through other witnesses also take the [874] position that the method to immediately settle the dispute was to wit: arbitration, as the contract provides. That is an issuable fact and I offer it under that.

The Court: There is no such contract yet in evidence.

Mr. Andersen: That is the contract put in evidence.

The Court: On the promise it would be connected up. It hasn't been connected up. Any questions with reference to arbitration would seem to be without foundation.

Mr. Andersen: May it please the Court, it has been connected up. I think it was put in evidence. I don't believe my recollection is wrong. I may be wrong. I don't want to get into an argument of the record with the Court. My recollection is that it was admitted into evidence. We called Mr. Schmidt. My notes show it was put in evidence subject to no qualifications of any kind. It is our position that it is an issuable fact in the case. If the contract—if this jury finds it carried over, as Mr. Schmidt testified, it will be our position that this Company had to arbitrate the matter before it could do any-

(Testimony of Erland Pearson.)

thing else. On the basis I have stated, we respectfully state it is admissible.

The Court: My recollection of Mr. Schmidt's testimony as far as this contract is concerned, is that it was put in out of order on condition that it would be connected up. It was admitted in evidence subject to being connected up. I [875] may be wrong, of course, in my recollection.

Mr. Strayer: Your Honor is correct.

Mr. Banfield: Your Honor is correct. In the first place, the contract is simply amendments to the previous contract and was put in on the basis that it would be connected up. I call the Court's attention that counsel has again misstated the record. When Mr. Flint was on the witness stand he was asked about a certain conversation with Mr. Albright, who and when and where, by each side. They went on, one conversation after another. On cross-examination Mr. Andersen kept saying "Didn't he say so-and-so" and "Didn't he offer to arbitrate." We are willing to show what the conversation was. We expected a connection, but a connection never came. That is how the evidence got in here regarding arbitration. None of it was brought in by us whatever.

The Court: I can't see how willingness to arbitrate is relevant here at all.

Mr. Andersen: I have stated it, may it please the Court.

The Court: Yes, I know your position.

(Testimony of Erland Pearson.)

Mr. Andersen: I have stated my position as clearly as I can. If the Court won't permit the evidence to be put in, I would like to make an offer of proof; namely, this witness will testify——

The Court: Perhaps we better have that in the absence of the jury. The jury may be excused until called.

(Whereupon the jury retired from the courtroom.)

Mr. Andersen: In order that I may understand your Honor, do I understand your Honor to say arbitration is not an issue in this matter at all?

The Court: I don't see how it is. I am willing to hear from you.

Mr. Andersen: In order to make sense, I want to know your Honor's position. Do I understand your Honor to rule, even though a contract has an arbitration clause that still arbitration is not an issue in this case?

The Court: I think my ruling contemplated that if there was such a contract here in effect between the plaintiff and the defendant, Local 16, then there would be a predicate for anything that would be relevant, but the condition on which that contract was admitted in the evidence has not yet been met.

Mr. Andersen: Well, then, I mentioned to the Court that—or rather I did this: we put the contract in evidence. It is in evidence, your Honor said, subject to a motion.

The Court: No, subject to your connecting it up.

(Testimony of Erland Pearson.)

Mr. Andersen: But I understand further—I mentioned this to the Court before, I want the Court to understand what I have in mind—we take the position we can't put all the aspects of the case in at one time, may it please the Court. [877] That is impossible. We take the position as a matter of law based upon the facts that that contract which Mr. Schmidt testified had been carried right over to Juneau Spruce—your Honor will recall he testified that was the contract—and after the Juneau Spruce took over they carried right on under that contract, as well as carried over under the I.W.A. contract. It is our position and upon which the jury must find that that contract itself, that is the contract to which Mr. Schmid testified was in full force and effect between the parties from May 1, 1947, on. It is our position that is the question. It is in issue here.

The Court: Before you get farther, my recollection of Mr. Schmidt's testimony was not that the contract carried over, but that the practice inaugurated under that contract carried over. That is a different thing. There is nothing to show here that it would be a matter of law for the Court to decide, that this previous contract between the Juneau Lumber Company and the defendant was assumed by its successor, and the Court hasn't held that and no necessity had arisen for passing on that. Before this testimony that is now about to be offered by this witness could possibly become rele-

(Testimony of Erland Pearson.)

vant, the Court would have to hold that that contract was binding on the plaintiff.

Mr. Andersen: I think we are talking about the same thing, but from different angles. Mr. Schmidt testified [878] substantially as your Honor stated; namely that from and after May 1 they carried on the same practices with not only the Longshoremen but with the I.W.A. that they previously carried on, the I.W.A. contract as well as the I.L.W.U. contract. He even testified grievances were settled. To make my point specific, from that course of conduct on the part of the Company, and the course of conduct of the Longshoremen accepting employment on that same basis, it is our position that the contract was carried over. We contend that it is an issuable factor in the case. We can simply show that. We offer this to ascertain—the evidence is practically in already—that the contract carried over and that it would be their duty to arbitrate. If your Honor thinks, with that statement before you, that the evidence is not admissible, your Honor should so rule.

The Court: The testimony on behalf of the plaintiff is all to the effect that there was never any intention to either assume the contractual obligations of the predecessor or that they ever were, in fact, assumed. Of course, in the interim, you might say, of the expiration of the contract of the predecessor and the execution of the contract of November 3, there would be a necessity arise of adopting some method or practice to iron out any disputes that might arise, but it wouldn't have the effect as

(Testimony of Erland Pearson.)

a matter of law to put into effect the whole contract, and particularly in the face of [879] the testimony on behalf of the plaintiff that they did not assume that contract or any other contract, that it was their purpose to have new contracts executed. In that state of the testimony any evidence as to the willingness or unwillingness of Local 16 to arbitrate is irrelevant.

Mr. Andersen: Just before your Honor rules, then pursuant to your Honor's ruling, I offer—we offer to prove through Mr. Pearson, the witness on the stand, the following facts: that from and after April 30 or May 1 of 1947 there was a contract in effect between the Juneau Spruce Corporation and Local 16, one of the defendants herein, that the contract contains an arbitration clause. We have the contract on our desk. It has an arbitration clause and requires the Company to arbitrate pursuant to that. Mr. Pearson would testify as President of the Union and that prior to July 1 of 1948 and at all times subsequent thereto, Local 16 has at all times been willing not only to negotiate, but to arbitrate, any and all issues involved in the dispute at the yard of the plaintiff herein. I might state that the arbitration clause is in the usual wording.

The Court: Is that a copy of the contract that has already been admitted conditionally?

Mr. Andersen: No; we would introduce this also, may it please the Court.

The Court: What is it? [880]

(Testimony of Erland Pearson.)

Mr. Andersen: The Coast-wise agreement, may it please the Court, which is referred to in the one in evidence, the gentlemen from the Northland Transportation Company, regarding arbitration and settlement of disagreements—he testified yesterday.

The Court: How do you reason that a contract between the Northland Transportation and the Local would be binding on Juneau Spruce?

Mr. Andersen: Because I believe Mr. Schmidt testified the Juneau Spruce authorized the Northland Transportation Company to negotiate for them in all contracts and the Juneau Lumber too, I believe. That is all the waterfront employers up here formed some sort of association, Juneau Dock Employers or some such name, and the gentleman on the stand, I believe yesterday, is Secretary or something of that organization, the gentleman occupies that position, so all the employers here entered into contracts with the Longshoremen's Union—that contract has the arbitration clause to which I refer. The practice of the Pacific Coast, may it please the Court, is somewhat similar, Waterfront Employers' Association of the Pacific.

The Court: The question is whether the Juneau Spruce joined the Waterfront Employers' Association. Where is evidence to that fact? I don't recall any.

Mr. Andersen: I don't believe there is any, may it [881] please the Court. The evidence upon which we rely I have already stated to your Honor. I am

(Testimony of Erland Pearson.)

perfectly frank in stating to your Honor Mr. Schmidt, I believe, on direct examination testified as your Honor indicated, that after the Juneau Spruce took over they did not as their predecessor had done, joined the Dock Employers' Association, at least so far as longshore work was concerned. I don't know if it was limited or general basis, or if at all. We are only concerned in this aspect, but I understand the fact to be after May 1, 1947, Juneau Spruce did not. We consider that an immaterial factor.

The Court: You contend they are bound nevertheless, even though they did not join?

Mr. Andersen: Yes. It is our position, we have raised the question of fact. May I read Section 9 as part of my offer of proof?

The Court: You can do anything you want as part of your offer.

Mr. Andersen: I offer to prove under the contract presently in effect between—presently in effect between the parties, or at least in effect at the time this dispute arose, says "The Secretary of Labor or any person authorized by the Secretary at the request of either party shall forthwith appoint a standing Coast Arbitrator and also standing Local Arbitrator in each of the four regional districts who shall serve for the period of this agreement," and in the event [882] that any Labor Relations Committee—maybe I better read the clause, Section 9. By the way, your Honor will recall that Wayne Morse, who is a Senator now, was at one

(Testimony of Erland Pearson.)

time Arbitrator on the Coast. "In the event that any Labor Relations Committee or the parties hereto fail to agree on any question involving a basic interpretation of this agreement or any other question of mutual concern not covered by this contract relating to the industry on a Coastwide basis, such question, at the request of either party, shall be referred for decision to such Coast Arbitrator. In the event that any Labor Relations Committee or the parties hereto fail to agree upon any question of local application within twenty-four hours after it has been presented, such matter, at the request of either party, thereupon shall be referred for decision to the local Arbitrator for the district in which the matter in dispute arises. The Coast Arbitrator shall have the power to determine whether any question in dispute involves a basic interpretation of the agreement and if the dispute in question is one of mutual concern relating to the industry and not covered by the agreement, whether it is of Coastwise or local application. If any Standing Arbitrator, Coast or port, shall be unable, refuse or fail to act, or resign, then the Secretary of Labor shall promtply appoint his successor or substitute. The expenses of any arbitrator shall be borne equally by the Association and the Union. Nothing in this [883] section shall be construed to prevent the Labor Relations Committee from agreeing upon other means of deciding matters upon which there has been disagreement."

(Testimony of Erland Pearson.)

It is our position pursuant to this agreement there was at all times available a Coast Arbitrator, a Local Arbitrator or the other arbitration procedure set up in the section to which I referred. It should have been referred to arbitration under the contract and therefore this witness's testimony that at all times they were ready and willing to negotiate and arbitrate is relevant to the issue.

The Court: That is the same contract you contend carried over from the Juneau Lumber to the plaintiff?

Mr. Andersen: Yes, your Honor.

The Court: Since, as I have already held, there is no evidence to that effect, then this testimony as to willingness to arbitrate is without foundation and premature.

Mr. Andersen: May I extend the offer of proof as to the testimony of this witness? We also offer to show by this witness that from April 30, 1947, so far as longshore work in Juneau is concerned, particularly in relation to the Juneau Spruce Corporation, that Local 16 was never advised of any termination of any contract, that on the contrary they were hired in the same manner and under the same conditions under the contract in evidence, that any grievances that arose on the job were settled in the same manner, and further, so [884] far as the Longshoremen are concerned, they were hired in identically the same manner and there was no difference in their relations with the Juneau Spruce and the Juneau Lumber.

(Testimony of Erland Pearson.)

The Court: You make that last offer to show in fact the contract carried over?

Mr. Andersen: Yes, your Honor. I have stated it as clearly as I can. Contracts may be implied or may be expressed. I know of many instances where the Labor Board, like in a famous petition case, a runaway case where the corporation changed states, may it please the Court, as well as name, the National Labor Relations Board held them to be bound by the contract. I don't like to argue with Courts. It seems to be presumptuous. I have stated my facts as clearly as I can. I think it is clearly admissible.

The Court: As I have said before, whether or not this contract that has been introduced conditionally in evidence is binding upon the plaintiff, is a matter of law upon which the Court has not yet had occasion to pass, because the question has not been presented yet. As far as showing willingness to arbitrate under the contract, that hasn't yet been shown to be applicable or to have been adopted by the plaintiff. The evidence is premature.

Mr. Andersen: I think I will then offer this agreement. I think I shall offer it for identification then. I will offer it as de novo. It is intended to complete the [885] Defendants' Exhibit C which is in evidence, and this will be for identification, and in pursuance to our offer of proof we offer the agreement itself in evidence for identification, your Honor.

(Testimony of Erland Pearson.)

The Court: It may be marked for identification.

Mr. Andersen: As part of our offer of proof I would like to extend it one step further. Pardon, what is the number?

Clerk of Court: This exhibit has been marked Defendant's Exhibit No. D for identification.

Mr. Andersen: I would like to show through this witness and appropriate questions that during the life of that agreement there have been many arbitrations under the terms of the arbitration clause to which I referred, of local conditions, disputes which arise between dock employees here and the Longshoremen.

The Court: You may call the jury.

Mr. Strayer: Your Honor please, before the jury comes back I would like the record to show that plaintiff does not object to—and I understand your Honor is not precluding—any competent evidence of any contract between the Company and either of the defendants.

The Court: No.

Mr. Andersen: All I can show is what I have offered to show, that from May 1 on these men were hired in the same [886] manner, in the same way, as stated in the offer of proof, and that grievances were settled in the same way and disputes in the same way and they were never advised of a contract termination or claimed termination. It is our contention—well, I have already stated my position.

(Testimony of Erland Pearson.)

The Court: Your contention is there was an implied contract that was substantially similar in terms?

Mr. Andersen: Yes, your Honor, the same.

The Court: You say you have no objection to that?

Mr. Strayer: I think it all depends on how far that evidence would go. I think counsel's offer of proof should be made by evidence and we can see if it constitutes legitimate evidence.

The Court: Evidence of willingness to prove or arbitrate is premature. There is nothing in the record at the present time showing that the formal contract carried over or that there was an implied contract equivalent in terms. If you put in evidence of that kind, why then it may become relevant to permit evidence of this kind in.

Mr. Andersen: May I state my position again? May I first get a drink of water? Mr. Schmidt's testimony is now before the Court. My offer of proof is now before the Court. As I conceive Mr. Schmidt's testimony and my offer of proof the effect of that, so far as the defendants are concerned, is a contention based upon issuable facts which we [887] feel should go to the jury on the following premise: Exhibit No. C is a contract entered into between Juneau Lumber Mills and Local 16 that was introduced through Mr. Schmidt. He testified that a contract was in effect April 30, 1947. He testified that immediately thereafter they carried on their same practice under this contract

(Testimony of Erland Pearson.)

with the Longshoremen's Union. He testified that thereafter they carried on the same practice, the same terms, worked under the same agreement with the I.W.A. That was his testimony. This witness, as I have already indicated, through the offer of proof——

Mr. Strayer: May I suggest, your Honor, the witness should be questioned.

Mr. Andersen: The only time that action is taken is when a client is on the stand.

The Court: That this witness be questioned?

Mr. Strayer: This is the witness you refer to?

Mr. Andersen: He is the one, and this witness, as I have indicated in my offer of proof, would testify that from and after May—that from and after the date of the contract, there was no change in the working conditions.

The Court: Until when?

Mr. Andersen: Until they finally refused to negotiate with them.

The Court: Well, before the execution of the contract of November 3? [888]

Mr. Andersen: Yes, your Honor.

The Court: How long before?

Mr. Andersen: At least October 3, at least in September, that there was absolutely no change in their hiring practice. Mr. Schmidt has already testified there was no change in the hiring practice. They never advised the Union there was no such contract. The Union carried on in the same manner, they were hired in the same way, paid the same wages except

(Testimony of Erland Pearson.)

when there was a raise and then, of course, Juneau Spruce paid the raise and everybody else paid the raise. There was no question about that. So, it is our position that the contract was in effect, and being in effect, they had to arbitrate; therefore, arbitration here is a relevant matter. We are raising the question that they had to arbitrate. Certainly they say there was no contract. There is no question about that. That is their contention. We contend there is, and was, and go so far as to say there is a contract.

The Court: The Court didn't intend to preclude you from showing there was a contract, and that is the condition under which Exhibit C went into evidence.

Mr. Andersen: The only way to prove the facts, except by stipulation, is by asking the witness.

The Court: You were asking the witness as to willingness to arbitrate. That is my ruling. [889]

Mr. Andersen: Do I understand that the question itself is untimely?

The Court: Yes. In other words, there isn't a sufficient foundation as to the evidence of an implied contract. If you feel you have enough evidence to that fact——

Mr. Andersen: I will ask this witness questions such as from and after May 1, 1947——

The Court: You don't have to explain. You will be permitted to question him as to evidence of any contract, but my ruling that the question of the willingness of the defendant Local to arbitrate is premature, stands. You may call the jury.

(Testimony of Erland Pearson.)

Mr. Strayer: One more thing, your Honor. As I understand your Honor's ruling counsel now will be required to establish a contract and I understand he can question the witness regarding past practice? It has been our position all the way through that past practice is not admissible, unless they reach the point of establishing a contract, we don't think. Such evidence will be of prejudice to the plaintiff if you let it come in unless the Court will rule if it is a jury issue and such a contract. It seems to me if counsel—I think he should state exactly the answers, or by testimony in the absence of the jury, so we can determine if we have evidence to go to the jury.

The Court: It hasn't been the practice of this Court to submit any proof of his good faith. Mr. Andersen is an officer of the Court here and I feel that if he offers to show a certain state of facts at least sufficient to go to the jury, I think he should be allowed to do so without requiring it in advance. It is subject to being stricken if it falls short, but he should be given the opportunity.

Mr. Andersen: I was going to suggest a short recess. I am not sure I understand your Honor.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: You will be given all the opportunity you wish to prove an implied contract.

Mr. Andersen: That is fine.

The Court: You may proceed.

(Testimony of Erland Pearson.)

Q. Again, for the record, you are the President of Local 16? A. That is correct.

Q. As President of the Local, have the affairs of the Local in relation to the employers, come to your attention? A. Yes, sir.

Q. Would you speak a little louder, please, so all of us will hear you. A. Yes, sir.

Q. Prior to—would you glance through Exhibit 3, please. Just take your time and read it.

The Court: You said "3," but I thought it was the [891] contract of November 3?

Mr. Andersen: I thought I said "C." I meant "C."

The Court: The record may show the reference was to Defendants' Exhibit C.

Q. This contract to which I have directed your attention—the collective bargaining testimony of Mr. Schmidt, do you recall that?

A. I wasn't here during the latter half of his testimony.

Q. Do you recognize this contract?

A. Yes, I do.

Q. What is this contract?

Mr. Strayer: Your Honor, please, for the record, might it be understood that we object to all this testimony concerning past relations concerning Juneau Lumber Mills and Local 16, unless it is connected up, on the ground that it is irrelevant and immaterial.

The Court: If it isn't connected up it will be stricken.

(Testimony of Erland Pearson.)

Mr. Andersen: Will you repeat the question?

Court Reporter: "What is this contract?"

A. That is a contract pertaining to working conditions between the Local 16 and the Waterfront Employers of Juneau.

Q. Between Local 16 and the Waterfront Employers of Juneau? A. That is correct.

Q. Do you know if the Juneau Lumber Company was a member of [892] the Waterfront Employers? A. Yes, sir.

Q. And after May 1, or after April 30 of 1947, the date that Juneau Lumber Company sold to Juneau Spruce Company, were the Longshoremen here hired in the same manner?

Mr. Strayer: I object to that as leading, your Honor.

The Court: I don't know—it isn't leading. It may not be, depending on what the rest of it is.

Q. After April 30 of 1947, so far as Juneau Spruce Corporation is concerned, were they hired in the same manner, by the same person, and under the same terms and conditions as they had been hired before?

Mr. Strayer: I object to that as leading, and it is a complex question and also calling for a conclusion of the witness.

The Court: I think in view of the nature of the question that it ought to be split up and call for merely a yes or no answer.

Q. I will put it this way: how were the men

(Testimony of Erland Pearson.)

hired by the Juneau Lumber Company, if you know?

A. Whenever a barge or scow or ship or anything that carried lumber, or water-borne commerce, would come into the Juneau Lumber Mill dock, they would call the Longshore Hall as they do right today, I mean as the other Waterfront Employers do, to ask for a certain number of Longshoremen [893] at a certain time, and the men go down to work at that designated time and perform the work.

Q. After Juneau Spruce took over was there any difference in the method of hiring, the method of pay, the method of settling grievances, the method of arbitration, or anything else, so far as Juneau Spruce was concerned?

Mr. Strayer: I object to that, the same as before. It is complex and calls for a conclusion.

Mr. Anderson: I submit the question is not complex. It calls for a yes or no answer.

The Court: Yes. Objection overruled.

Mr. Andersen: Will you read the question, Miss Reporter?

Court Reporter: "After Juneau Spruce took over was there any difference in the method of hiring, the method of pay, the method of settling grievances, the method of arbitration, or anything else, so far as Juneau Spruce was concerned?"

Mr. Strayer: May I make a further objection? I object to anything concerning grievances or method of arbitration or adjustment of disputes.

(Testimony of Erland Pearson.)

The Court: I think it should eliminate those two, grievances and arbitration.

Mr. Andersen: This is my witness. I am asking him the question. This is my witness. This is new matter. I [894] certainly have the right to ask my witness whether there was any grievance there.

The Court: You are not basing this question on past testimony?

Mr. Andersen: What do you mean by "past testimony"?

The Court: That point counsel raises that there was no testimony as far as past practice, grievances or arbitration.

Mr. Andersen: I believe there was, your Honor. I believe there was testimony. Of course, this has been a long trial, and I am sure that I, as well as the jury and your Honor, can't remember everything. It seemed to me I asked Mr. Schmidt about handling——

The Court: Objection overruled. You may proceed.

Mr. Andersen: Will you read the question please, Miss Reporter?

Court Reporter: "After Juneau Spruce took over was there any difference in the method of hiring, the method of pay, the method of settling grievances, the method of arbitration, or anything else, so far as Juneau Spruce was concerned?

A. No, there wasn't.

Q. Were there any changes in rates of pay, if

(Testimony of Erland Pearson.)

you recall, from May 1, 1947, until we will say, the end of the year?

A. If I remember right, we got an increase. I don't remember [895] the exact amount—I believe twelve and a half cents an hour raise in pay, which took effect——

Q. When?

A. I couldn't be exact as to the date.

Q. About what month?

A. I believe it was in June.

Q. Of 1947? A. I believe so.

Q. And did Juneau Spruce pay that raise in pay for the work they did, the same as all the other employers on the dock?

A. They did. For any Longshoremen that worked there they paid the pay, certainly.

Q. For any Longshoremen they hired?

A. That is correct.

Q. This contract to which I have referred, refers to Local 16, does it not? That is your Local?

A. That is correct.

Mr. Andersen: May I have just a moment, your Honor?

Q. Now, this particular contract which is exhibit No. C, does this refer to the Coast agreement?

A. To the Coast agreement? No, sir. That pertains only to the Juneau Waterfront Employers and Local 16.

Q. Does it in terms refer to the Coast agreement, as far as arbitration is concerned?

(Testimony of Erland Pearson.)

A. That is the understanding all the time; if Local 16 and [986] any one of the Waterfront Employers get into a dispute that cannot be settled here, then through the Local agreement it would go below to the Coast or a Local Arbitrator for settlement.

Mr. Strayer: I move to strike that as not responsive and stating a conclusion and understanding.

Mr. Andersen: He is President of the Local testifying as to the Local.

The Court: As I ruled before, the objection might go to the part on which he was examined.

Q. I direct your attention, Mr. Pearson, to Section 9——

Mr. Andersen: In the interest of time, it would be better to take a recess, and I could correlate this material better.

The Court: I like to split the afternoon session, but if you think we can save time we will take a recess for ten minutes.

(Whereupon Court recessed for ten minutes, reconvening as per recess with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Andersen: At this time I desire to offer in evidence Defendant's Exhibit D for identification. I assume you have seen it? While counsel is examinging the document, may I read a portion of this, may it please the Court? [897]

(Testimony of Erland Pearson.)

The Court: If counsel do not object. They can't do both.

Mr. Andersen: That is true.

Mr. Strayer: We object to the offer, your Honor, as irrelevant and immaterial. The contract is not properly identified or shown to have any relation to the Juneau Spruce Corporation.

The Court: Is this the same?

Mr. Andersen: If I state it, probably the Court will see the point and counsel will, too. I will read the first portion of Exhibit 3—Exhibit C.

Mr. Strayer: Just a moment. That exhibit is not in evidence, as I understand it, or it is subject to the reservation of being connected up and not proper until then.

Mr. Andersen: It is marked in evidence, your Honor.

The Court: Only conditionally in evidence, and until it is connected up, as I have said before.

Mr. Andersen: How am I going to connect it up unless I read a portion and talk to the witness about it?

The Court: But you are about to read it to the jury.

Mr. Andersen: And to the Court, for the purpose of getting Exhibit D in evidence.

The Court: It is improper to read it to the jury at this time, but you may base your questions to witness on it, of course. [898]

Q. Mr. Pearson, Exhibit C you have already tes-

(Testimony of Erland Pearson.)

tified was the contract which was in effect after May 1, is that correct? May 1, 1947?

A. That is correct.

Mr. Andersen: Now I offer this in evidence, may it please the Court.

Mr. Strayer: That is objected to on the same ground as it was before, not connected with Juneau Spruce Corporation in any way.

The Court: That is the agreement by the Juneau Lumber Mills?

Mr. Andersen: Which we say was carried over from Juneau Lumber to Juneau Spruce, and under which they operated, according to the testimony of Mr. Schmidt and the testimony of Mr. Pearson.

The Court: Whether it was carried over is not for the witness to say. On a matter of law it has to be shown that in fact it was carried over.

Mr. Andersen: That is what I am trying to show.

The Court: You asked the witness if it was carried over. That is a matter for the Court to decide. That is an insufficient basis to consider the exhibit fully in evidence.

Mr. Andersen: What I am trying to do at this moment, may it please the Court, so the Court will have in mind these two documents, Defendant's Exhibits C and D, are really the [899] same document, that is, Exhibit C is an amendment to Exhibit D. Exhibit D is signed by Juneau Spruce Corporation.

Mr. Strayer: Oh, no.

(Testimony of Erland Pearson.)

Mr. Andersen: Sorry, I mean Juneau Lumber Company—signed by them, and this document on its face refers to Exhibit C—on its face refers to Exhibit D, that it is an amendment to Exhibit D. Does your Honor follow me there?

The Court: Yes, I follow that.

Mr. Andersen: Mr. Schmidt has testified that this hiring practice remained the same after May 1 of 1947. This witness testified everything was the same, and it is our contention—which is the only fact that can be inferred from his evidence, of course—that after May 1, 1947, both parties, to wit, Local 16 and Juneau Spruce, adopted this contract through their course of conduct with each other from and after May 1, 1947. That is the testimony of this witness, may it please the Court, and it is on that basis I offer it.

The Court: You are not offering to show an implied contract, you are offering to show a former contract carried over.

Mr. Andersen: Well, certainly, and as an implied contract through their ratification. It doesn't make any difference to us whether it was an implied contract or whether it was the course of conduct of the parties, I guess. It is our position substantially that through a course of conduct between [900] the parties this happened. Either it was actually carried over, or through a course of conduct between the parties, an implied contract arose. Under this agreement, there is no evidence by Mr. Schmidt or

(Testimony of Erland Pearson.)

this witness that it carried over on this contract from this. It is a matter of fact for the jury at this point, as I construe the evidence.

The Court: There is nothing in Mr. Schimdt's testimony that would justify that conclusion, but if you have evidence to show in opposition to the testimony on behalf of the plaintiff, that plaintiff assumed this contract, of course you may certainly go ahead and prove it.

Mr. Andersen: Your Honor, I have already put that evidence in through Mr. Pearson.

The Court: You mean his conclusion it was in effect?

Mr. Andersen: Not his conclusion. He testified as to the facts. He testified that from and after May 1, 1947, his relation—the Union's relation—with the Juneau Spruce Corporation was identical to what it had been with Juneau Lumber Corporation. They were never advised of any termination of any contract. On the contrary, when the Juneau Dock Employers granted a twelve and a half cent raise in June of 1947, according to the witness Juneau Spruce also paid that raise which was under the contract. Now, I don't know what more evidence we can present.

The Court: The most you have shown is that there was [901] a practice here to call on the Longshoremen to do certain work but that is far from showing that that carried over the contract to the successor, to the plaintiff:

(Testimony of Erland Pearson.)

Mr. Andersen: Now, maybe reasonable minds will disagree on what your Honor has stated, not as a matter of law—we are talking about a matter of fact, and maybe reasonable minds will differ. I don't know, but the Longshoremen's position is that having carried on under this contract they ratified it, operated under it, and it became, if not an expressed, an implied contract between the two of them. Mr. Pearson testified under that contention and that a wage increase was paid without trouble. They recognized their duty under the contract to pay it, otherwise, of course, they wouldn't have paid the money. On that basis we contend the contract carried over.

The Court: The Court holds it is insufficient to hold or bind Juneau Spruce Corporation, and to hold that that contract carried over.

Mr. Andersen: Then may I——

The Court: I think the foundation is insufficient. There is no evidence here whatever except to the contrary that Juneau Spruce ever recognized this contract in their dealings with Local 16 after they took over. You might argue that there is an inference to that effect from the fact that they called them up and asked them to come down and do longshore [902] work. That isn't sufficient to put a contract in effect or continue its life.

Mr. Andersen: Your Honor, my position on the point is very simple. There is either a contract in effect or there isn't a contract in effect, whether

(Testimony of Erland Pearson.)

the contract is expressed or whether the contract is implied. Whether the contract is in effect either as an expressed contract or an implied contract is an issue of fact, as I see it.

The Court: But there have to be facts first. There is no ratification, no testimony that Juneau Spruce said "We will continue this contract in effect." The fact that they called up the Longshore Hall and hired somebody to come to do longshore work isn't an implied contract. That is an expressed contract from time to time, as occasion arose. That isn't inconsistent with the testimony of the plaintiff, that they never adopted this contract or expressly repudiated it.

Mr. Andersen: So far as the Longshoremen are concerned, may it please the Court, there was no repudiation of the contract.

The Court: No, I am speaking of the plaintiff.

Mr. Andersen: We are not bound here by the plaintiff's position, may it please the Court. Certainly the plaintiff comes in here and offers one theory, one chain of evidence. We are not bound by that.

The Court: You have to show plaintiff did something [903] from which it could be inferred they intended the contract to continue and be bound by it, and the evidence so far is too short of that.

Mr. Andersen: Yes, it has to be shown, you and I agree. Possibly as to the quantum we don't agree. This witness has adequately shown that the Juneau

(Testimony of Erland Pearson.)

Spruce carried on under and adopted this contract, whether we call it expressly or impliedly, it is immaterial so far as that is concerned. Maybe I can develop it further.

The Court: I am not going to cut you out from developing it, but at the present the Court's impression is that practice similar under this contract falls short of binding the plaintiff in this case. If you want to go into it further, you may.

Mr. Andersen: Mr. Roden directed my attention to the Taft-Hartley Act. They couldn't divest themselves of the relationships with their employer. Of course, that is a matter of law I assume your Honor has taken into consideration in your Honor's ruling. I also want to direct another matter to your Honor's attention, so far as the contract is concerned. It is in evidence for another matter. It was introduced in evidence in impeachment of Mr. Flint. Mr. Flint, you will recall, stated that the longshoremen never had a contract with—that is, the Juneau Spruce never had a contract with—Local 16. He testified to that very emphatically. We offer this [904] contract also for the purpose of showing there was such a contract.

The Court: You mean with Juneau Lumber?

Mr. Andersen: Yes, Juneau Lumber. At the time we offered it in evidence when we were talking to Mr. Flint with regard to it, shortly after Mr. Flint left the stand, I offered it with relation to Mr. Flint. He said there was no contract between

(Testimony of Erland Pearson.)

Local 16 and Juneau Lumber, and I asked Mr. Schmidt specifically if it referred to Local 16, and it went in evidence on that basis.

The Court: It doesn't become available for every other purpose, and particularly for binding the plaintiff.

Mr. Andersen: It is in evidence.

The Court: Only for that limited purpose.

Mr. Strayer: It was not put in evidence for that. Mr. Flint never testified to no such contract. He testified there was never a longshoremen's practice.

Mr. Andersen: He testified there was an investigation. I asked "Did you make an investigation?"

The Court: That is immaterial, anyhow. Even though it is in evidence for that purpose it is not evidence for showing plaintiff corporation was bound by it.

Mr. Andersen: I was under the impression that when an exhibit is admitted for evidence it is for all purposes.

The Court: Not if it is for a limited purpose.

Mr. Andersen: I didn't limit my offer. No objection was made to its going in. Mr. Schmidt testified——

The Court: It couldn't have gone in for any other purpose, except for what it would rebut at the time.

Mr. Andersen: I will endeavor with Mr. Pearson.

(Testimony of Erland Pearson.)

Q. (By Mr. Andersen): Do you recall, Mr. Pearson, after May 1, 1947, whether there were any grievances arose on the job, discussed with the management in the same way they were discussed before?

Mr. Strayer: I object to that in the absence of the proper foundation. The witness testified he didn't become a longshoreman until 1947.

Mr. Andersen: He testified he is the president and familiar with its affairs.

Mr. Strayer: He can't testify to what happened before October.

Mr. Andersen: That is the objection I made on the case in chief, but if the witness knows——

The Court: Unless he knows, his testimony would necessarily have to be based on hearsay.

Mr. Andersen: The official affairs of the union, your Honor.

The Court: At a time when he was not president?

Mr. Andersen: He is president of the union now. I will submit the objection to your Honor. [906]

The Court: He may answer if he knows.

Q. Do you know?

A. I would like to have it restated.

Mr. Andersen: Read the question.

Court Reporter: "Do you recall, Mr. Pearson, after May 1, 1947, whether there were any grievances arose on the job, discussed with the management in the same way they were discussed before?"

(Testimony of Erland Pearson.)

A. By the "management"—what do you imply there—the Juneau Spruce Corporation?

Q. Yes.

A. All I know is that we were continually trying to get a written contract with them.

Q. To supplement Exhibit C?

Mr. Strayer: I object to that, your Honor, as calling for a conclusion and not within the knowledge of the witness. There is no proper foundation for it.

Mr. Andersen: That may be stricken.

Q. What I mean is whether any grievances on the job came up? For instance, you mentioned a twelve and a half cent wage increase you got in 1947. How did you get that? How did it come about?

A. Through negotiating with the Waterfront Employers of the Pacific Coast.

Q. And after that negotiation did all of the dock employers [907] here, including Juneau Spruce, pay that twelve and a half cent raise?

A. It applies automatically.

Q. Did you have any trouble getting it from Juneau Spruce? A. No, sir.

Q. Well, were your checks automatically increased that much money?

A. That is right. There was no trouble.

Q. That is the wage raise matter. Do you recall, or do you know—strike that. From time to time a minor dispute would arise on jobs and there

(Testimony of Erland Pearson.)

is a grievance clause in Exhibit D, I think—do you have in mind when minor grievances arose on jobs, were they taken up and settled with the Juneau Spruce in pursuance to this contract?

Mr. Strayer: May we have the time?

Q. After May 1, 1947, and up to November of 1947?

A. To my knowledge we had no trouble with the Juneau Spruce except we were trying continually to get a written contract with the new people.

Q. With the new company?

A. With the new company.

Q. Of course, until April 10 of 1948 the Local 16—did Local 16 do all the longshoring done there the way they had done, with the exception of this dispute about the barge?

A. To my knowledge they did; yes. [908]

Q. Is it true that all during that period you men had been hired in the same manner that you were hired before by Juneau Lumber?

A. Up to October?

Q. No, up to November 3, 1947.

Mr. Strayer: May we have the full question read, your Honor?

Mr. Andersen: Will you read it, Miss Reporter? The question wasn't answered. I will have to call another witness to supplement it. You may examine.

(Testimony of Erland Pearson.)

Cross-Examination

By Mr. Strayer:

Q. Mr. Pearson, you started work as a longshoreman in October of 1947?

A. I became a member of the local, but I worked as a longshoreman from the fall of 1946 on, off and on.

Q. Isn't it a fact you were employed by the Juneau Spruce Corporation during the summer and early fall of 1947?

A. 1947; I went to work for Juneau Spruce Corporation on August 11 and quit sometime the first part of October.

Q. You quit on October 15, did you not?

A. Sometime in the first part of October, I believe.

Q. What were you doing between May 1, 1947, and October 15, 1947? [909]

A. I was doing a little trolling and working extra longshoring.

Q. How much of that time did you work at longshoring?

A. A considerable amount of time.

Q. How much?

A. I have no records to show, but I worked a considerable amount of time.

Q. About how much?

A. About how much?

Q. Yes.

A. At least once a week on the average.

(Testimony of Erland Pearson.)

Q. During the entire period?

A. No, I wouldn't say that. I am taking the whole time as a—what I mean is taking the time—you mean from May to October?

Q. Yes.

A. I couldn't say exactly. I did considerable longshoring.

Q. Can't you say during what period of time you did that? Let's get at it this way: when did you start work for the Juneau Spruce Corporation in 1947? A. August 11.

Q. And you worked for them until October 15?

A. Yes.

Q. We have got the period from May 1 until August 11. What were you doing during that period of time? [910]

A. As I say, I was fishing. I have a trolling boat. I was trolling and doing longshoring on the side when I would come into town for something.

Q. You were doing longshoring off and on?

A. Correct.

Q. Did you do any longshoring for Juneau Spruce Corporation during that period?

A. No, I didn't.

Q. Then you never worked as a longshoreman for the Juneau Spruce Corporation prior to October 15, 1947? A. Prior to October 15?

Q. Yes.

A. I worked one boat for the Juneau Spruce Corporation, but I am not sure of the time. I believe it was later than October 15, 1947.

(Testimony of Erland Pearson.)

Q. Is that the only work you have done for Juneau Spruce Corporation?

A. No, sir. I worked there from August 11——

Q. I mean as a longshoreman.

A. Yes, I believe it is.

Q. What was that boat—was it a commercial steamer? A. No.

Q. What kind of boat?

A. It was a cannery tender, I believe, or a small boat. I don't remember. [911]

Q. Was that the only time you worked as a longshoreman for Juneau Spruce?

A. Myself, yes.

Q. Who paid you for that work, Mr. Pearson?

A. Well, the Juneau Spruce usually paid for it, but in this instance another fellow and I, Joe Guy and I, were working on the boat and the skipper went up—or rather, we went over to the office to turn in our time and be paid, but the Juneau Spruce, they absolutely refused to pay us at that time, so the skipper of the boat had to go to the Juneau Spruce and get cash and he paid us in cash, because the Juneau Spruce Corporation refused to pay us.

Q. About when was that?

A. To my knowledge, I believe it was the latter part of November.

Q. The latter part of November of 1947?

A. That is correct.

Q. Who called you down there to do the work?

(Testimony of Erland Pearson.)

A. Juneau Spruce Corporation.

Q. Did they call you personally?

A. They called the hall, called the delegate.

Q. Did they talk to you?

A. Juneau Spruce?

Q. Yes.

A. No, sir. They did down there, yes. [912]

Q. No, I mean who called the hall and ordered the men to come down?

A. I have no idea of who was calling, but somebody in the office.

Q. You have no personal knowledge of who called, do you?

A. I know it was somebody from the Juneau Spruce Corporation.

Q. How do you know?

A. Because the employer always calls the hall.

Q. How do you know it wasn't the cannery tender that called? A. How do I know?

Q. Yes.

A. I couldn't answer that question.

Q. You say Juneau Spruce usually called you, but on this one occasion the cannery tender skipper paid you? A. Yes.

Q. How do you square that with the statement that you never worked for Juneau Spruce except the one time?

A. Because Juneau Spruce called and asked for men and if they did as before, naturally Juneau Spruce would have paid us.

(Testimony of Erland Pearson.)

Q. Did Juneau Spruce ever call you and pay you for longshore work?

A. Like I told you, I just worked for them this one time.

Q. So you never got any money from Juneau Spruce Corporation directly for any work that you did for them, did you?

A. I got it from them indirectly. The skipper went over and [913] secured the money to pay us.

Q. You never got any money from them directly for any longshore work you ever did?

A. I considered it directly because it just changed hands.

Q. When you say "Juneau Spruce usually paid them" you are talking about other longshoremen and not yourself, isn't that correct?

A. That is correct.

Q. When you are talking about Juneau Spruce Corporation paying that raise in pay, did you get that raise in pay from the Juneau Spruce Corporation?

A. It was applicable at the time I worked, so I automatically received it.

Q. And that is the basis for your statement that Juneau Spruce paid the same rate of pay that other employers were paying?

A. Absolutely.

Q. I am talking about this twelve and a half cent increase you got.

A. I said approximately twelve and a half cent increase.

(Testimony of Erland Pearson.)

Q. I understand. After you signed up your agreement with the Waterfront Employers, putting in effect that increase, you longshoremen wouldn't work for any less than that, would you?

Mr. Anderson: That assumes something not in evidence. It assumes there was no agreement. [914]

Mr. Strayer: Mr. Pearson testified the wage rates were increased twelve and a half cents.

Mr. Andersen: He said there was some sort of arbitration for a wage increase and——

The Court: He is questioning him to find out if the Juneau Spruce increased it, or whether it was the Waterfront Employers or whether they increased their own pay, in order to clarify it.

Q. Do you remember the question, Mr. Pearson.

A. No.

Mr. Strayer: Would you read the question?

Court Reporter: "After you signed up your agreement with the Waterfront Employers, putting in effect that increase, you longshoremen wouldn't work for any less than that, would you?"

A. From time to time wage raises come into any contract.

Q. Can't you answer that question yes or no and then explain it, Mr. Pearson?

A. We are paid exactly what our contract calls for.

Q. Will you work for less than that?

A. Not under our contract; no.

Q. Suppose I call up your union hall for you

(Testimony of Erland Pearson.)

to come do work for me. Would you work for me for less than the contract price agreed to with the Waterfront Employers?

A. As a union man I would live up to my contract. [915]

Q. Yo uconsidered those wage rates as binding on anyone who called for your services?

A. Correct.

Q. And you wouldn't work for any other wage, would you?

A. That is the way I looked at it.

Q. Would you work for any other conditions, other than what was in the contract?

A. That is what a union is for, to get conditions and live up to them.

Q. If you worked for anyone the work you did would be under the conditions you had with that Waterfront Employers' contract?

A. Absolutely.

Q. Mr. Pearson, don't you work as a longshoreman for a lot of people with whom you have no contract?

A. With whom we have no contract?

Q. Yes.

A. That is a kind of hard question to answer, but all the Waterfront Employers of Juneau signed a contract with Local 16 and the employers who don't sign that contract automatically live up to the waterfront agreement with the longshoremen, and carried it out as such.

(Testimony of Erland Pearson.)

Q. How many employers are there that just follow along on the terms of that contract without themselves making a contract with you? [916]

A. Roughly, I would say twenty-five.

Q. There are many occasions when itinerant boats come to Juneau and call on you for longshore work, isn't that right?

A. Many of these small boats have a contract with us.

Q. Many of them do not, too, don't they?

A. That is correct.

Q. Then you furnish longshore services to those people, too, don't you? A. Certainly.

Q. And you draw the same rate of pay as you do with a contract with the others?

A. Correct.

Q. And the same deductions? A. Yes.

Q. You have the same size crews?

A. The size of the crews varies with the size of the job.

Q. But in accordance with your port rules, don't you? A. That is correct.

Mr. Strayer: That is all.

Redirect Examination

By Mr. Andersen:

Q. Just a few further questions. Mr. Strayer asked you about not having contracts with waterfront employers. [917] You said they referred—they all lived up to the Waterfront Employers'

(Testimony of Erland Pearson.)

agreement. What agreement did you refer to?

A. The Waterfront Employers of Juneau agreement with Local 16.

Q. Is this the agreement here, is this Exhibit C? Is this the type of agreement?

A. That is correct.

Q. This is it? A. That is correct.

Q. With respect to the Juneau Spruce company —Juneau Spruce Corporation—did they at any time tell the longshoremen's union as far as you know, as far as longshore work—as it had been done there in the past, that any agreement had been terminated? A. No, sir.

Mr. Andersen: I again renew my offer.

Mr. Strayer: The same objection.

The Court: What is the offer?

Mr. Andersen: Exhibit C being in, Exhibit D being a part of Exhibit C.

The Court: To show what?

Mr. Andersen: To show the implied contract between the parties.

The Court: Objection sustained.

Mr. Andersen: That is all of this witness. [918]

Mr. Strayer: Just a moment. May we have this marked for identification?

The Court: It may be marked for identification.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 21 for identification.

(Testimony of Erland Pearson.)

Recross-Examination

By Mr. Strayer:

Q. Mr. Pearson, handing you a document marked Plaintiff's Exhibit No. 21 for identification, I will ask you if that is not a copy of the contract which you had with the Waterfront Employers in Juneau in September, 1947?

A. I couldn't answer that. I was not a member of the local at that time.

Q. You don't know what contract they had in September, 1947?

A. Yes, I do, the one that was just handed in.

Q. Is this it?

A. That isn't the contract. That runs for the Territory of Alaska, not for the Port of Juneau.

Q. Was it applicable to the Port of Juneau?

A. Partially; yes.

Q. You do know that a contract was in effect then, between Local 16 and the Waterfront Employers here in Juneau?

Mr. Andersen: I think the witness has answered the question, may it please the Court. [919]

The Court: I beg your pardon?

Mr. Andersen: I think the question has been asked and answered.

The Court: He answered he didn't know because he was not a member of the local, and later intimated——

Mr. Andersen: He said it was a contract for the Territory of Alaska.

(Testimony of Erland Pearson.)

The Court: He certainly intimated that he knew what it was. You may question him further if you wish.

Mr. Strayer: May I have this one marked for identification?

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 22 for identification.

Q. Now, Mr. Pearson, here is an exhibit marked Plaintiff's Exhibit No. 22 for identification. Do you know whether that was in effect between Local 16 and the Waterfront Employers of Juneau in 1947?

Mr. Andersen: This is all immaterial, may it please the Court. I can't see the purpose of it. As I understand the Court's ruling, the Court isn't allowing Exhibits C or D in, and Mr. Schmidt and this witness testified contracts were in effect. Unless counsel says it is a supplement to these contracts——

The Court: I don't see your point.

Mr. Strayer: Defendants contend Exhibit C was in [920] effect to 1941. I am trying to identify the contracts in 1947. I am trying to find out if those and not the others were in effect.

Mr. Andersen: Exhibits C and D are one document. They contain the annual renewal clause. They keep going from one year to the other. Mr. Schmidt testified it was in full force and effect and automatically renewed. The fact that it is dated in 1941 is immaterial. I fail to see the relation of

(Testimony of Erland Pearson.)

these agreements and your Honor's ruling regarding C and D.

Mr. Strayer: Mr. Schmidt said that they were similar.

Mr. Andersen: He said C was it.

The Court: Your purpose now is to show what the contract really was with its amendments or supplements?

Mr. Strayer: I am merely trying to find out what it was.

Mr. Banfield: I think I got counsel started. The purpose is to show the agreements of 1938 have gone by the boards years ago and by their terms, and have been superseded by new agreements, and that is it in September, 1947.

The Court: Not binding on the plaintiff?

Mr. Banfield: Just rebuttal. If the Court is allowing them to go in they are terminated, and new contracts have taken effect.

The Court: These contracts, Plaintiff's Exhibit C, [921] the only purpose for which it was introduced was to show the relation with the plaintiff's predecessor, and no other purpose.

Mr. Strayer: That is all the questions, your Honor.

(Witness excused.)

VERNE ALBRIGHT

called as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Andersen:

Q. You have been sworn, Mr. Albright? When did you first learn that this dispute was in existence at the Juneau Spruce?

A. At the Mayor's Fact Finding Committee. I was called from Cordova.

Q. When was that?

A. The fore-part of May.

Q. The fore-part of May of 1947?

A. Last year. 1948.

Q. I mean 1948. Where had you been for the two or three months prior to May of 1948?

A. Cordova and Seward.

Q. Cordova and Seward? A. Yes, sir.

Q. Had you been in Juneau for two or three months prior to May of—put it this way: when was the last time prior to May, 1948, that you were in Juneau?

A. I passed through Juneau on the Denali in the latter part of December, sometime of 1947.

Q. Of 1947? A. That is right.

Q. Now, you say you came to Juneau then in the first part of May, is that correct? A. Yes, sir.

Q. Of 1948. Now, when you got here did you communuicate with Local 16?

(Testimony of Verne Albright.)

A. Yes, they met me at the plane station. They had wired for me.

Q. They met you at the plane station. When you came here did you endeavor to assist them?

A. They asked me to and I did.

Q. That is Local 16? A. Local 16.

Q. From that time on while you were here in Juneau and in relation to the dispute, what was your capacity? How did you act and what was the nature of it?

A. I was representing Local 16 at their request.

Q. You were representing Local 16?

A. That is right. [923]

Q. And in that capacity did you have various meetings with various people? A. Yes, sir.

Q. And what were you endeavoring to do?

A. To reach a settlement in the dispute, a peaceable settlement.

Q. As representative of Local 16, you were endeavoring to reach a settlement? A. Yes, sir.

Q. Did you have meetings with Mr. Flint?

A. Yes, sir.

Q. And did you meet with other people here in town? A. Yes.

Q. Did you have a meeting with Mr. Flint together with a Mr. Garst? A. Yes, sir.

Q. And who was Mr. Garst?

A. The Federal Mediator, out of the Federal Mediation and Conciliation Service.

Q. Do you know how long he remained in town?

(Testimony of Verne Albright.)

A. About three days, something like that.

Q. You say he was Federal Mediator?

A. Yes.

Q. Did you have a meeting with Mr. Garst and Mr. Flint?

A. With Mr. Burtz and—— [924]

Q. Mr. Burtz and Mr. Flint?

Mr. Strayer: May we have the time?

Q. Do you recall the date of the meeting?

A. It was sometime during May, I don't just know the date.

Mr. Andersen: Could I have that exhibit? I think it is dated May 14—the pink letter, Mr. Clark.

Q. I show you Plaintiff's Exhibit No. 6, and you can look at the date on that and see if it refreshes your memory.

Mr. Strayer: May 6 is it? Is it, Mr. Andersen?

Q. May 15; it is Plaintiff's Exhibit 6.

A. Yes, I remember.

Q. You remember that meeting, do you?

A. Yes, sir.

Q. And Mr. Garst you say was there?

A. Mr. Garst and Mr. Burtz called me at the Gastineau and asked me to meet them at the Baranof, and I already had met with Mr. Card.

Q. Was Mr. Flint there?

A. Not at that time. I think he came in later in the evening.

Q. With respect to this letter dated May 14,

(Testimony of Verne Albright.)

were you asked to do anything with relation to this letter?

A. Yes. That proposal was brought out by Mr. Burtz and Mr. Garst asked me my opinion, and I told them I didn't think it would be satisfactory. Mr. Garst wanted to know if I would take it back to the local committee, and I did the [925] next day.

Q. Did the local act upon it? A. Yes.

Q. Did you have any further meetings with these people?

A. I believe this was on Sunday, and Mr. Garst left next day, I believe, or the day after that, without further meetings—for Los Angeles, which was his home town.

Q. He was here three days, the government mediator, and then he went back to Los Angeles?

A. That is right.

Q. Nothing was accomplished towards mediation while he was here? A. That is right.

Q. That was about May 14?

A. About that time.

Q. How long did you remain in town after that?

A. I was here off and on, with short trips out, practically all the summer.

Q. About what time did you leave?

A. I can't recall just what dates or what times —I made short trips—I went to Ketchikan once and over to Sitka one time, but I can't recall——

Q. You were here most of the time?

(Testimony of Verne Albright.)

A. Yes, most of the time.

Q. You would go around and then back? [926]

A. Yes. I was at Pelican City also.

Q. Do you recall if you had a subsequent meeting with Garst before he left, after the fourteenth?

A. He only met with us. He came down and shook hands and said he was leaving. He said he couldn't do anything and went as far as he could.

Q. In any event, he left without having settled the matter, is that true? A. That is right.

Q. After that meeting of May 14, did you again have any meeting with Mr. William Flint?

A. They were off and on meetings.

Q. In your same capacity, representing Local 16? A. That is correct, sir.

Q. And were you able to work anything out toward settling this matter? A. Nothing.

Q. In any of your conversations with him did you suggest arbitration? A. Yes.

Mr. Strayer: I object to that as immaterial.

The Court: Yes, it is immaterial.

Mr. Andersen: I beg your pardon, your Honor?

The Court: Objection sustained.

Mr. Andersen: As I recall Mr. Flint's testimony there were denials of it. With respect to Mr. Flint's testimony, it goes to the entire conversation, your Honor.

The Court: That may be, but the witness is not testifying to the rest of any conversation now.

Mr. Andersen: I can't hear your Honor.

(Testimony of Verne Albright.)

The Court: The witness is not testifying, as I understand his answer, or pretending to, to the rest of any conversation.

Mr. Andersen: That was the purport. I thought to save time by not asking all that was said.

The Court: The Court doesn't remember now every conversation by this witness or anybody else.

Mr. Andersen: If your Honor will recall, Mr. Flint first said he had one hundred conversations with Mr. Albright. After that he boiled it down to about four where there was really any conversation. We had this long to-do about Mr. Flint denying arbitration, then he admitted he was confused about negotiation and arbitration. With this witness I am endeavoring to clear that up.

The Court: It is not a matter of getting the rest of the conversation?

Mr. Andersen: To find out the entire conversation.

The Court: That applies where the adversary brings it out, and you brought it out on cross-examination.

Mr. Andersen: I will abide by your Honor's ruling, [928] if your Honor's ruling is that it is immaterial, that is all right with me.

The Court: Objection sustained.

Q. In all of these meetings with Mr. Flint, did you tell Mr. Flint, when the occasion arose did you tell Mr. Flint whom you were representing?

A. I always acted as representative of the local.

(Testimony of Verne Albright.)

Q. Did you tell Mr. Flint that?

A. Yes. He was aware of the fact.

Q. Did you ever tell anybody in this city that you would see that the pickets stayed on down there for ten years or twenty years or any other period of time, sir? A. Not that I can recall, sir.

Q. About May 8, did you talk to Mr. Flint about removing any picket lines.

Mr. Strayer: May 8 or 28, did you say, counsel?

Q. Eighth.

A. On the eighth—I can't recall if I talked on the eighth or a specific date, but one time there was discussion of removing the picket line.

Q. What was that?

A. We had a discussion pursuant to removing the picket line and letting the I.W.A. go back to work.

Q. When you use the word "we," on whose behalf are you speaking? [929]

A. I am talking of Local 16.

Q. Did you ever, during any of your visits here, during this dispute, did you ever have any authority or had you been given authority by the International Union, to, on their behalf or as their agent, participate in this dispute? A. No.

Mr. Strayer: I object to that as calling for a conclusion of the witness. The exhibit in evidence, the Affidavit of Mr. Albright, states all his authority was in the form of oral instructions from Mr. Bulcke. He is entitled to testify what the oral in-

(Testimony of Verne Albright.)

structions were, but not a conclusion as to what his authority may have been.

Mr. Andersen: My question was general, may it please the Court.

The Court: Will you repeat the question?

Court Reporter: "Did you ever, during any of your visits here, during this dispute, did you ever have any authority or had you been given authority by the International Union, to, on their behalf or as their agent, participate in this dispute?"

A. No.

The Court: The objection is overruled, anyhow.

Q. Did Mr. Flint ever talk to you about advice in relation to I.W.A., do you recall?

A. Not that I recall. [930]

Mr. Andersen: You may examine.

Cross-Examination

By Mr. Strayer:

Q. As I understand you, Mr. Albright, your testimony is that everything you did in connection with this dispute you did at the request and on behalf of Local 16? A. That is correct.

Q. And you had no instructions whatever from San Francisco in that regard?

A. That is right.

Q. You testified the other day that you were employed by the International Longshoremen's and Warehousemen's Union?

A. That is correct.

(Testimony of Verne Albright.)

Q. And you draw your salary from the international? A. Correct.

Q. You testified your territory, I believe, was Alaska? A. Correct.

Q. And that you were supposed to assist and advise all the locals in the Territory of Alaska?

A. When they so request me to represent them.

Q. And give them such assistance as you can?

A. Correct.

Q. Those are your instructions?

A. Correct. [931]

Q. As the result of that you travel around a good deal from one local to another?

A. That is right.

Q. I think you said during the summer of 1948 you traveled to Ketchikan, Sitka, Pelican City and other places? A. Right.

Q. Those trips you took on behalf of Local 16?

A. No.

Q. Whose?

A. When one of those locals would request me to come it was in their behalf.

Q. Did you make a trip to Prince Rupert in August, 1948, on behalf of Local 16?

A. On behalf of all the Alaska locals.

Q. On behalf of all the Alaska locals you went down to Prince Rupert? A. That is correct.

Q. Was it on business of Local 505 of Prince Rupert?

A. It had something to do with that.

Q. It had a great deal to do with Local 16?

(Testimony of Verne Albright.)

A. Correct.

Q. To see that lumber was not unloaded at Prince Rupert? A. It did not.

Q. It had nothing to do with that?

A. That is right. [932]

Q. Did you arrive there before the barge got there? A. I think it was the day before.

Q. Was the barge there when you got there?

A. I think not.

Q. The barge got there while you were there, then? A. I think it did.

Q. You took Mr. Joe Guy with you, or did he go a different way?

A. He went on his own. I didn't take him with me.

Q. Did he arrive at the same time you did?

A. I think he did.

Q. Was he there on union business too?

A. I don't know what he was down there for.

Q. You were there during the time the barge was there, were you?

A. The barge was there when I left.

Q. Did you talk to the longshoremen down there regarding the labor troubles up here at Juneau?

A. No.

Q. You didn't say a word to them about it?

A. No.

Q. You didn't talk about the trouble Local 16 was having with Juneau Spruce Corporation?

A. No. I had other business there.

(Testimony of Verne Albright.)

Q. That had nothing to do with what you went down there for? [933] A. No.

Q. Did you leave the same day the barge left?

A. I don't know when the barge left.

Q. Where were you prior to going to Prince Rupert?

A. In Ketchikan, I was there three weeks prior.

Q. Prior to going to Prince Rupert?

A. That is right.

Q. Did you have any communication from Local 16?

A. Not to my knowledge—that I can recall, I should say.

Q. You don't recall any telephone calls or correspondence? **A. No.**

Q. You destroy all correspondence, so you wouldn't know for sure?

A. That is not the reason I destroy correspondence.

Q. But you don't have any correspondence?

A. Yes.

Q. One of your duties is to make reports to Mr. Bulcke in San Francisco regarding your activities?

A. To the International.

Q. Do you make that report every two weeks?

A. Once a month or every two weeks.

Q. Did you make a report regarding this dispute at Juneau?

A. I told them the general progress of it.

Q. How often did you make reports to San

(Testimony of Verne Albright.)

Francisco regarding the dispute between Local 16 and Juneau Spruce Corporation? [934]

A. Only as part of the general report I made concerning other locals in the Territory and other issues.

Q. You keep them advised of all progress or lack of progress up here? A. Right.

Q. And you told them what about it?

A. As near as I could.

Q. And you passed on to the International what you understood the facts to be about the dispute?

A. That is correct.

Q. You don't have, as I understand it, any copies of those reports you made to the International? A. I have not.

Q. Or you don't have any of the letters you received from the International in return?

A. No, sir.

Q. It is a fact, is it not, Mr. Albright, all the way through this dispute in the summer of 1948 you acted as spokesman for Local 16 in these matters? A. Whenever they asked me.

Q. Whenever you had a meeting you acted as spokesman? A. At their request.

Q. And on July 4, 1948, you appeared before the C.I.O. Industrial Union Council to speak on behalf of this Local 16, did you not? [935]

A. I can't recall. I think I did.

Q. You spoke in favor of passing a resolution, didn't you, at that time?

A. I merely stated the issues of the dispute as

(Testimony of Verne Albright.)

I seen them. I had no authority in the Council. I am not a member.

Q. Did you recommend a resolution in support of Local 16?

A. I couldn't recommend anything. I was not a delegate to the Council. I had no authority.

Q. Do you recognize this, Mr. Albright, as a copy of the resolution passed by the C.I.O. Industrial Council on that date? A. Yes, sir.

Mr. Andersen: May I see it?

Mr. Strayer: Yes. May we have it marked, please?

(Whereupon the exhibit was marked Plaintiff's Exhibit No. 23 for identification.)

Q. Plaintiff's Exhibit No. 23 for identification is a copy of the resolution that was passed?

A. That is right.

(Whereupon counsel for plaintiff handed the exhibit to Mr. Andersen.)

Q. And after this resolution was passed by the Industrial Union Council, isn't it a fact that you——

Mr. Andersen: I am going to object to any use of the resolution. It is not in evidence. It has nothing to do with [936] this. It is incompetent, irrelevant and immaterial.

Q. Isn't it a fact after its passage you took it to the newspaper and asked the newspaper to publish it here in Juneau?

Mr. Andersen: The same objection.

The Court: Objection overruled.

(Testimony of Verne Albright.)

A. I don't believe I took it to the newspaper. I think a committee of the longshoremen or the Industrial Council did, but I didn't.

Q. You deny you took it there? A. Yes.

Q. Who was the committee that took it down?

A. I do not recall.

Q. Any of them? A. I don't recall.

Q. Was it this present Industrial Union Council?

Mr. Andersen: I object.

Mr. Strayer: I offer it in evidence.

Mr. Andersen: The same objection. Mr. Albright's name isn't mentioned, nor is he referred to in it.

The Court: What is the purpose of the offer?

Mr. Strayer: The purpose of the offer, your Honor, is to show the participation by Mr. Albright in the action of Local 16 and of Mr. Albright himself in inducing the C.I.O. council itself in condemning the I.W.A. and supporting the [937] I.L.W.U., and because the publication——

Mr. Andersen: There is nothing in the document to show Mr. Albright induced anything.

Mr. Strayer: I think it is a matter of inference. He said he spoke and gave them what he thought was the facts.

Mr. Andersen: That doesn't follow at all, may it please the Court. The Industrial Union Council here, as I understand it, is composed of many unions which, I further understand, is an autonomous body which does as it pleases.

(Testimony of Verne Albright.)

The Court: That objection goes to the weight, but I think it is admissible. It may be admitted.

(Whereupon the exhibit was marked Plaintiff's Exhibit No. 23.)

Mr. Andersen: I further object to it as hearsay, incompetent, irrelevant and immaterial, may it please the Court, and no foundation has been laid for its introduction.

Q. May I ask you another question about the resolution. Didn't you give a copy of that resolution to a newspaper reporter here in Juneau?

A. It could be, but I don't recall.

Q. Don't you recall you gave a copy to Robert Druxman and asked him to publish it?

A. I don't think I did.

Q. You have no recollection of having given it to him? A. That is correct. [938]

Q. To refresh your recollection, let me ask you didn't you meet Bob Druxman on the street after July 4, the date of this resolution, and ask him to write a story to put in the paper about this resolution? You have no recollection of that?

A. No.

Q. Isn't it a fact he asked you to furnish him with a copy of the resolution and you went and got a copy and went and brought him a copy?

A. He might have asked for a copy, but I didn't ask him to write a story.

Q. You don't recall that?

A. I didn't ask him to write a story.

(Testimony of Verne Albright.)

Mr. Strayer: I will read this if I may, your Honor, It says: "July 4, 1948. Resolution Condemning the Strikebreaking Action of Certain Officers and Members of I. W. A. Local M-271, of Juneau, Alaska.

"The Juneau Industrial Union Council, C.I.O., an organization composed of delegates from all C.I.O. Locals within the City of Juneau, Alaska, held a special meeting on July 4, 1948, and discussed the action taken by certain officers and members of I.W.A. Local M-271, Sawmill Workers, C.I.O. After considerable discussion by the delegates to the Council it was the unanimous opinion that should the Council permit such action by any members of its C.I.O. affiliates to go unchallenged [939] or for such members to escape the responsibility of their acts would be to jeopardize all the gains and conditions established in the past by organized labor, and the following resolution was adopted: Resolution

"Whereas: Certain officers and members of I.W.A. Local M-271, Sawmill Workers C.I.O., have publicly stated that they will return to work at the mill of the Juneau Spruce Corporation in disregard of the picket lines established by the I.L.W.U. Local No. 16;

"Whereas: The picket line is the only weapon available to organized labor when negotiations fail or the employer refuses to bargain; therefore, these certain officers and members of I.W.A. Local M-271, Sawmill Workers, C.I.O., are guilty of attempting to destroy the only economic weapon of labor, which act is a direct violation of the principles of good union-

(Testimony of Verne Albright.)

ism and as such is abhorrent to, and condemned by, all labor; and

"Whereas: No labor organization can condone such action by any of its members, and inasmuch as any union member acting as a strike-breaker must assume the full responsibility of his act; therefore,

"Be It Resolved: That the Juneau Industrial Union Council go on record as condemning the action of these certain officers and members of the I.W.A. Local M-271, Sawmill Workers, C.I.O., as that of strike-breaking; and [940]

"Be It Further Resolved: That the Juneau Industrial Union Council highly commend the action of those officers and members of I.W.A. Local M-271, Sawmill Workers, C.I.O., who have loyally and justifiably refused to participate in the above action; and

"Be It Finally Resolved: That copies of this Resolution be sent to the National CIO, to all State and Territorial Industrial Councils, and to all Central Labor Councils, and also be released to the press and radio. Juneau Industrial Union Council. Fred Orme, Secy-Treasurer. Seal."

Q. Mr. Albright, I will ask you if it isn't the effect of the passage of this resolution and dissemination of it to blacklist those who passed the picket line?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

The Court: You might ask him if he knows.

Mr. Andersen: The same objection, and calling for a conclusion of the witness. It is improper cross-examination.

(Testimony of Verne Albright.)

The Court: Objection overruled.

A. I wouldn't know.

Q. You don't know? A. I don't know.

Q. How long have you been engaged in Union matters, Mr. Albright—actively engaged?

A. In Local I.L.W.U., Local 62, since 1941 I have been a [941] member since then to the present date.

Q. 1941. Were you engaged in Union activities before that time?

A. Before that, here and there.

Q. You have been a Union man all your life?

A. Not all my life.

Q. You have been an International Representative of I.L.W.U. since when?

A. Since the tenth of November, 1947.

Q. And yet you don't know——

The Court: Since when—what was that date?

A. The tenth of November, 1947.

Q. You don't know the effect of branding a man as a strikebreaker?

Mr. Andersen: I object to that. It is argumentative.

The Court: It is not argumentative. Objection overruled.

A. To answer that question you ask me, if this resolution—if I knew the effect it had, I don't know. I don't know how far it was disseminated around the country. I have no knowledge.

Q. Answer my question. Do you know the effect of branding a man as a strike-breaker?

(Testimony of Verne Albright.)

A. I wouldn't want to be one. I don't think it is honorable.

Q. What is the effect if he wants to get a job?

Mr. Andersen: I object to that as incompetent, irrelevant, immaterial, and calling for a conclusion and it is argumentative.

The Court: He may answer if he knows.

A. That is hard to answer, very hard. I wouldn't know for sure the extent of it.

Q. You just don't know? You acted as spokesman for Local 16 before the Mayor's Fact-Finding Committee? A. Correct.

Q. And stated the position of the Local Union for that body's consideration? A. Correct.

Q. The first part of May?

A. The first part of May; the fore-part of May.

Q. Didn't you tell the Mayor's Fact-Finding Committee that the dispute with Local 16 was only the beginning? Didn't you intimate if the Longshoremen lost this dispute with the Juneau Spruce that this same demand would be made by other employers in Alaska?

Mr. Andersen: I object to that as speculative.

The Court: The question is what he said.

Q. Did you say that then?

A. I can't recall any such conversation or such remark. I think that what you have got in mind—only you have twisted it—I said at the meeting this might be a start. It is an [943] upset in the practice in Alaska and might immediately spread to other

(Testimony of Verne Albright.)

ports and other Unions, and other companies might demand the same thing.

Q. It was true, wasn't it, in your opinion?

A. That is right.

Q. You were confronted about that time or shortly after that with the same or similar situation in Sitka, were you not?

Mr. Andersen: I object. Reference to Sitka is not within the direct examination.

The Court: It goes to his relations with the defendant. Objection overruled.

A. What instance in Sitka?

Q. I am talking about an argument between the Longshoremen and the lumber company over the right to load barges.

Mr. Andersen: In Sitka, counsel?

Q. In Sitka.

A. In Sitka—I made a trip in 1948 over there, but it was concerning the barges and sizes of gangs on the barges. I sat with the Local and the local sawmill. It was not over this part of it.

Q. Isn't it a fact there was a dispute there which arose in part at least because the sawmill workers were loading lumber on barges?

Mr. Andersen: I object to that. It is improper cross-examination. It isn't a discussion now about authority, but entirely different.

The Court: It goes to his relations with the defendant, I.L.W.U.

A. I never made a trip over there on a dispute.

(Testimony of Verne Albright.)

Q. I don't care if you did or not, I am asking if there wasn't such a dispute up there?

A. Not that I ever took part in.

Q. Don't you know there was such a dispute?

A. No.

Q. Didn't you testify before the National Labor Relations Board that there was?

A. I said it could be possible there was such a dispute.

Q. Well, let's see what you said. You remember testifying before the National Labor Relations Board? A. Yes, that is true.

Q. I am reading from page 464. I will ask you if this question was asked and the answer given by you. Question by Mr. Paul, "Is there any difficulty or labor dispute existing or claimed at Sitka, regarding barge loading?" A. "Yes, two barges left there loaded by sawmill workers." Does that refresh your memory?

Mr. Andersen: You should——

Q. "I received this complaint by wire from there quite some time ago and the other one just recently. The Longshoremen were not aware what a true registered dispute is." Do [945] you recall giving that testimony?

A. I don't. If it is in the record, I must have.

Q. Does that refresh your memory, that you do have knowledge?

A. No. Perhaps such a dispute did exist, innumerable disputes occur.

Q. Isn't it a fact after Mr. Card presented this

(Testimony of Verne Albright.)

letter suggesting a proposal for settlement of this dispute by the Juneau Spruce Corporation, May 14, 1948, isn't it a fact you suggested certain changes in the letter? Do you recall that?

A. I suggested certain changes which they tried to get, but Mr. Card wouldn't consent to it.

Q. Isn't it a fact you suggested certain changes in this letter and the matter was sent back to Mr. Card and he drew up a new letter and incorporated the very changes you asked for? A. Not correct.

Q. It is not?

A. He made a change, but not the changes I requested.

Q. Now Mr. Banfield has put a parenthesis around a clause in this letter, "Nets, Gear, Pallet Boards, Etc." As a matter of fact, the only change you wanted was to add in those letters which are now in parenthesis?

A. No. I asked that that type of longshore work be pencilled out and that is the way they did it, and I told them it was [946] not satisfactory.

Q. Not satisfactory to you?

A. That is right; that I would take it back to the Local committee.

Q. Didn't you tell Mr. Burtz when you were talking about this letter, didn't you tell him you had heard from the International and didn't dare sign this letter because it would upset the whole set-up in Alaska?

A. I don't recall that conversation.

Q. Didn't you tell Mr. Burtz you would have to

(Testimony of Verne Albright.)

maintain that picket line at all costs? A. No.

Q. There was no such conversation?

A. That is right.

Q. Didn't you go to a meeting that night, Mr. Albright, and tell the people at that meeting, including Mr. Burtz, Mr. Flint, the I.L.W.U. and I.W.A. representatives, and tell them you had a telephone call from the International and the Local had a letter from San Francisco headquarters, and the whole deal was off, you couldn't go through with it because it would establish a bad precedence?

Mr. Andersen: Which night?

Mr. Strayer: The same night.

Mr. Andersen: May 14?

Mr. Strayer: The fourteenth. [947]

A. I don't recall a meeting of that kind or that conversation.

Q. You don't recall? A. No, sir.

Q. You considered that if you agreed to the terms of this letter it would have set a bad precedence?

A. I merely said I didn't believe it would be acceptable to the committee. The next day the committee turned it down. I don't have authority to say. It is the rank and file, the committee of the Local, the rank and file.

Q. Do you recall your testimony at the Unemployment Compensation Commission hearing in connection with this dispute?

A. It is quite a long time ago.

Q. You appeared there? A. Yes.

(Testimony of Verne Albright.)

Q. As a representative of the Longshoremen, did you not? A. That is right.

Q. Do you recall testifying before that body, Mr. Roden, I believe, was in charge of that hearing?

A. That is right.

Q. Do you recall testifying that the I.L.W.U. had a dispute with the Juneau Spruce Corporation?

A. That is right, a dispute.

Q. You were talking about the International?

A. Local 16.

Q. Did you tell them Local 16? [948]

A. I said "I.L.W.U." That is common practice. I.L.W.U. means the Local.

Q. Let's see just what your testimony was, page 16.

Mr. Paul: The first half?

Q. About the middle of the page. Mr. Albright, I will ask you if this series of questions and answers was given at that hearing, Mr. Roden asking the question. "What is your official position?" Answer. "International Representative for the International Longshoremen's and Warehousemen's Union." Mr. Burtz asked you "Does your organization have a dispute with the Juneau Spruce Corporation?" Answer. "Yes, sir." Do you recall giving that testimony?

A. That is right, talking from the point of Local 16, that was the understanding.

Q. Turn over to the next page, page 17. Were these questions asked and these answers given: Mr.

(Testimony of Verne Albright.)

Burtz asked, "Is your organization recognized throughout the United States, Canada and Alaska as having jurisdiction over the loading of cargo on seagoing vessels?" Answer, "On the West Coast we are." Were you still talking about Local 16?

A. The I.L.W.U. as a whole; yes.

Q. Mr. Burtz asked, "How long has the I.L.W.U. Local No. 16 furnished employees for the loading of lumber from the Juneau Spruce Corporation or its predecessor?" Answer, "Approximately ten years." Do you recall giving that [949] testimony?

A. That is right.

Q. Mr. Burtz asked, "No one questioned your right as Longshoremen to perform that work?" Answer, "No." Mr. Burtz asked, "Is the present dispute with the Juneau Spruce Corporation because the Company will not establish wages or working conditions, or what is the argument?" Answer, "They refuse to recognize us." Do you recall giving that testimony? A. I think that is correct.

Q. Were you still talking all the time about Local 16? A. That is right.

Q. Mr. Burtz asked "Did they make a public statement that if you were legally certified they would recognize you?" Answer, "I understand they did." Do you recall giving that testimony?

A. Yes, I think that is correct.

Q. Certification, of course, refers only to the International, doesn't it? A. No, sir.

Q. All right. Mr. Burtz asked, page 18, "They are

(Testimony of Verne Albright.)

hiding behind technicalities and have an unfair labor dispute with your organization?" Answer, "That is correct." Do you recall giving that testimony?

A. If it is in the record, if it is correct. [950]

Q. Still talking about Local 16, no reference to the I.L.W.U.? A. That is right.

Q. Just how does this I.L.W.U. function with its Locals? I am speaking particularly with reference to the charters. Are Locals chartered by the International?

A. They are given to the Local as an affiliate.

Q. Local 16 holds a charter from the International? A. Yes.

Q. And Local 505 at Prince Rupert also holds a charter from the International?

A. I think so. I have not seen it.

Q. Members of the Local are members of the International? A. Of the Local.

Q. That entitles them to the benefits of the International? A. Services of the International.

Q. Your contracting system, Mr. Albright, here on the West Coast—your International is the one that negotiates your contracts, is it not?

A. They do, and I think you will note it is on behalf of the Locals.

Q. The contract which applies on the Pacific Coast is written in San Francisco? A. Right.

Q. By Mr. Bridges, Mr. Bulcke and—I have forgotten the others?

A. Quite a number from the Coast. [951]

(Testimony of Verne Albright.)

Q. That master Coast contract applies all up and down the Pacific Coast? A. No, sir.

Q. It does not? A. No.

Q. Does it apply in Alaska?

A. We have an all-Alaska contract agreement.

Q. The contracts down there don't apply to Alaska?

A. Supplementary; we work here under the Alaska Longshoremen's Contract.

Mr. Andersen: I object to any further reference to the content of those agreements unless they—because they would be the best evidence of what they contain. The agreements are on the desk, which I offer. It is D for identification. That is the best evidence of what it contains regarding Alaska. I object.

Mr. Strayer: I am merely inquiring about the method of negotiating contracts.

Mr. Andersen: It is set forth in the contract itself and also in the Constitution.

The Court: I wouldn't think the method only, but what is agreed by the contracts. Objection overruled.

Q. You were just explaining to me, Mr. Albright, about the Alaska contract. How is that negotiated?

A. It is negotiated by—it is usually done in [952] Seattle or where the steamship operators are most available. We generally go where they most want us to. It is usually negotiated by some of the International Negotiation Committee on behalf of the Locals, subject to the ratification of the Locals in Alaska.

Q. Who acts on that Negotiation Committee down there?

(Testimony of Verne Albright.)

A. They are never the same. Generally the International officers, the Executive Board members, or whoever happens to be available—different negotiators.

Q. Did Mr. Bulcke negotiate one?

A. August 23, the greatest part of it.

Q. Do you read "The Dispatcher"?

A. Quite often.

Q. Is "The Dispatcher" the official newspaper of the International Longshoremen's and Warehousemen's Union? A. That is right.

Q. That is a copy of "The Dispatcher," is it not?

A. That is correct.

Mr. Strayer: Let me have this marked for identification, please.

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 24 for identification.

Mr. Andersen: May I see it, counsel?

Q. It is dated September 17, 1948; is that [953] correct?

Mr. Andersen: May I see it, counsel?

Mr. Strayer: Certainly. I want to identify it here first.

A. September 17, 1948; yes, sir.

Mr. Andersen: Do you refer to any particular portion?

Mr. Strayer: Yes, I am going to.

Mr. Andersen: Will you show it to me?

Mr. Strayer: Yes.

(Testimony of Verne Albright.)

Q. I refer you to page 6 of this issue of "The Dispatcher," which you have identified as "The Dispatcher" for September 17, 1948—withdraw that. This appears here that it is published every two weeks at 150 Golden Gate Avenue, San Francisco. Is that your understanding? A. That is correct.

Q. And according to the masthead that Harry Bridges is President, J. R. Robertson, First Vice President, Lincoln Fairley, Research Director, Louis Goldblatt, Secretary-Treasurer, Germain Bulcke, Second Vice President, and Morris Watson, Information Director. Are you acquainted with those officers? A. Yes, sir.

Q. And Morris Watson appears to be the Editor?

A. That is correct.

Q. Page 6—I ask you, did you furnish the information upon which this article was prepared? [954]

Mr. Andersen: That would obviously call for a conclusion and opinion of the witness. None of the articles there purport to be written by the witness.

Mr. Strayer: I am merely finding out if he furnished information, the same as in this article.

Mr. Andersen: I can't see the relevancy.

The Court: He may answer if he knows, if he furnished the information.

Mr. Andersen: He doesn't know, from what it says there.

The Court: If he doesn't know, he can say so.

A. It could have come in from the Local. They usually send in news reports.

(Testimony of Verne Albright.)

Q. My question is, did you furnish the information? A. For that article?

Q. Of the same character as in this article?

A. No, it wasn't necessary. The Secretary of the Local actually acts as Corresponding Secretary and corresponds with the Editor of the paper and sends information to the paper. Usually that is their request.

Q. Did you send the same information to your superior as appears in this article?

A. Let's see that again, please.

Q. I would like to have you read the following article while you are at it. [955]

Mr. Andersen: I object. It calls for a conclusion and opinion of the witness.

Mr. Strayer: Only if he knows.

The Court: He ought to know if he furnished the same or similar information.

A. This is better writing than I do. I do know about this Alaska contract. I merely wrote——

Mr. Andersen: That isn't the question. The question is whether you supplied that information?

A. No.

Q. You did not supply the same information?

A. That is right.

Q. But did, regarding the Alaska contract?

A. And that it had been ratified and they were pleased with it.

Mr. Strayer: We will offer this issue of "The Dispatcher" in evidence as an admission against interest

(Testimony of Verne Albright.)

of the I.L.W.U. Counsel has seen it. The article is here.

Mr. Andersen: To which I will object as incompetent, irrelevant and immaterial, and also, may it please the Court, I may be in error, but I know of no law which permits him to offer that for any purpose. It is either in evidence or it isn't. It may not be for a particular purpose. It is either admissible or inadmissible. If he offers the paper in evidence I am entitled to read the whole thing. [956]

The Court: If it is for a specific purpose it is limited to that purpose, although you can introduce the rest of it on your case. The only question, as I see it, is whether this constitutes an admission of the I.L.W.U. You offer it for that purpose?

Mr. Strayer: Yes, your Honor.

The Court: It may be admitted for that purpose only.

Mr. Strayer: May I put a pencil line around the article my offer is limited to, so there will be no misunderstanding what portion is offered?

The Court: Very well.

Mr. Andersen: Why not just read that portion into the record?

Mr. Strayer: That is what I was going to do. If you have no objection, I will do that.

Mr. Andersen: We object that it is incompetent, irrelevant, immaterial, and no foundation has been laid.

The Court: Objection overruled on the grounds stated.

(Testimony of Verne Albright.)

Clerk of Court: The exhibit has been marked Plaintiff's Exhibit No. 24, page 6.

Mr. Strayer: Page 6. The article on page 6 of this "Dispatcher," dated September 17, 1948, reads as follows: "Unfair Charges"——

Mr. Andersen: Will you please read the name of the person who wrote it? It is at the head of the [957] column, I believe.

Mr. Strayer: I don't see it.

Mr. Andersen: I thought I saw it there. It is under this heading there, "Seattle Watchmen."

Mr. Strayer: Sort of a pen name, do you mean?

Mr. Andersen: I don't know, but it says "Seattle Watchmen."

Mr. Strayer: I don't know what the reference is. Up at the lefthand column it says "Seattle Watchmen" and in the middle of the page is the article I would like to read, "Unfair Charges. A Taft-Hartley hearing against Local 16 is scheduled for Juneau, Alaska, September 21. The I.L.W.U. is charged with unfair labor practices for picketing the Juneau Spruce mill, which insists on using members of the International Woodworkers of America for longshore work on its barges and scows, contrary to practice established in 1941.

"The I.L.W.U. struck the mill last April after trying for months to get a contract with new purchasers, the Juneau Spruce Corporation, for longshore work on the same terms as the rest of the port.

"The Company signed with the I.W.A. for mill

(Testimony of Verne Albright.)

work alone, then in January ordered I.W.A. members to load lumber on its barges. In spite of conferences with the I.L.W.U. and statements from the I.W.A. that it did not want this work, the mill refused to negotiate with regular longshoremen. [958]

"When the I.L.W.U. hit the bricks, the I.W.A. respected the picket lines fully. The mill was shut down tight. Company charges of unfair labor practices were thrown out by the N.L.R.B.

"Then Bill Flint, President of the Juneau I.W.A. Local, was sent to Portland at the expense of Juneau Spruce to confer with I.W.A. International President James Fadling. He returned to Juneau with orders to his members from the International to disregard I.L.W.U. pickets in line with the Company's wishes. A number went back to work on pain of losing their jobs and seniority, enough to enable the Company to resume operations.

"Local 16 is maintaining its picket lines to protect its jurisdiction of longshore work in the mill. I.L.W.U. Second Vice President Germain Bulcke has informed all Canadian I.L.W.U. Locals that Juneau Spruce Mill products are unfair."

Q. Now, what is the effect, Mr. Albright, in Union circles, of declaring products of the Company unfair?

Mr. Andersen: The same objection, may it please the Court, calling for a conclusion and opinion of the witness; incompetent, irrelevant and immaterial. Could I have the number of that last exhibit, Mr. Clerk?

(Testimony of Verne Albright.)

Clerk of Court: Twenty four.

The Court: Objection overruled.

A. Well, it is pretty hard to tell just exactly the effect [959] taken.

Q. No good Union man will handle a product which your International says is unfair?

A. The law forces——

Q. Will Longshoremen handle a product which your International headquarters says is unfair?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion and opinion of the witness.

The Court: Objection overruled.

A. We are forced to under the law.

Q. Will you answer the question?

Mr. Andersen: I submit, does he want the witness to say he is not law abiding?

The Court: He apparently is not satisfied with a legal phrase. Objection overruled.

Q. Will members of your organization handle a product which your International says is unfair?

A. I can't answer the question, only that we don't violate the law. We are prevented from it.

Q. You want the jury to understand the Longshoremen will handle Juneau Spruce lumber then?

A. Down below?

Q. Yes.

A. I don't know what course they would take—I know what [960] course Canada's Longshoremen took—the steps taken are what you people say, but in the States—it didn't go to the States.

(Testimony of Verne Albright.)

Q. You know what course Canada's Longshoremen took?

A. But they are under a different law.

Q. As the result of Mr. Bulcke informing all the Canada Locals that Juneau Spruce products were unfair?

Mr. Andersen: I object.

The Court: He can ask him if he knows.

A. I don't know.

Q. You have no information at all? A. No.

Q. Have you been in touch with Mr. Berry down in Vancouver?

A. Occasionally, over the phone.

Q. About this particular labor dispute?

A. No; not over the phone.

Q. Didn't you talk with Mr. Berry recently about the effect of the National Labor Relations Board decision? A. Down in San Francisco?

Q. When you were attending the convention of the International? A. Yes.

Q. In April? A. The first part of April.

Q. As International Representative? [961]

A. As a visitor.

Q. And Mr. Berry was in the same capacity?

A. That is right.

Q. Did you talk with him at that time?

A. Yes.

Q. And you discussed the decision of the National Labor Relations Board?

A. I don't remember. The fact is, I don't think we had the decision when I was down there.

(Testimony of Verne Albright.)

Q. The decision came down about April 1, did it not?

A. I don't think I heard it or seen it until after the convention was over.

Mr. Andersen: I think you are both right. I think it came out a little bit later than that. It always takes several days for the National Labor Relations Board to get them out, Mr. Strayer.

Q. It appears to be dated blank day of March. Assuming it came out around the first of April, you don't think you knew about it at the time you were talking with Mr. Berry? A. No, I don't.

Q. Did you send a telegram to Mr. Berry after the National Labor Relations Board decision?

A. No.

Q. Did you either see him personally, or telephone him or telegraph him that the National Labor [962] Relations Board decision didn't make any difference?

A. No.

Mr. Andersen: I assume this is again subject to the extra-territorial objection I made before?

The Court: The same ruling.

Q. You never did? A. No.

Q. You never talked to him about it. Let me ask you a question on this article. Did you recommend Mr. Bulcke inform the Canada Locals that the Juneau Spruce was unfair?

A. I didn't recommend anything to Mr. Bulcke.

(Testimony of Verne Albright.)

Q. You gave the facts and he made his own recommendation? A. I didn't.

Q. You told him there was a strike up here at the Juneau Spruce mill? A. He was aware of that.

Q. You told him the Juneau Spruce Corporation had taken over the operation from Juneau Lumber Mill? A. Correct.

Q. And did you tell him that the Company signed with the I.W.A. for mill work alone, and then in general ordered the mill workers to load lumber on its barges?

A. I don't believe I went into details that way. I merely stated at different times, different parts of the dispute. [963] I can't recall I sent in any of that information.

Q. Did you tell him the Longshoremen had always done that work before? A. Undoubtedly.

Q. Did you tell him that the process of loading lumber on barges and shipping by barges was a new operation with this new Company?

A. I don't remember that.

Q. That is a fact, is it not?

A. I don't consider it a new operation. It happens at other ports, maybe not in this port.

Q. In this case?

A. I think it is a new type or way of handling lumber.

Q. You didn't consider there was any difference?

A. No; it still goes into commerce.

Q. You consider the Juneau Spruce Corporation

(Testimony of Verne Albright.)

is bound by any contract or practice which may have been followed by the predecessor?

A. That is right.

Q. And that was your position all the way through?

A. That is the way all work is based, for the employee to work.

Q. Did you report that view you had to Mr. Bulcke?

A. I didn't think it was necessary to report it.

Q. Did you? [964]

A. I didn't think it was necessary to report it.

Q. Whether it was necessary or not, did you report it? A. No.

Q. Did you report to Mr. Bulcke about Bill Flint going down to Portland?

A. I cannot recall. I don't believe I did.

Q. You don't think you told him anything about that? A. No.

Q. Did you tell Mr. Bulcke about Mr. Flint coming back from his International, about his orders from his International about his men going back to work?

A. Yes, I think I reported when they did go to work.

Q. You reported to Mr. Bulcke?

Mr. Andersen: May it please the Court, this article is dated May 17.

Mr. Strayer: September 17.

Mr. Andersen: I thought you said May 17.

(Testimony of Verne Albright.)

Q. Did you report to Mr. Bulcke the number of I.W.A. men who went back to work on pain of losing their jobs and seniority?

A. No, I don't think so.

Q. You don't know where he got that information? A. No.

Mr. Strayer: I think that is all.

Mr. Andersen: Is that all? [965]

Mr. Strayer: That is all.

Mr. Andersen: No further questions. You may step down.

(Witness excused.)

(Whereupon the jury was duly admonished and Court adjourned until ten o'clock a.m. May 11, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Andersen: May it please the Court, at this time I wish to renew my motion to strike evidence in relation to the I.L.W.U. that I have been making with respect to each witness. I would like to submit it at this time.

The Court: The same ruling.

Mr. Banfield: We would like a statement of counsel as to when he expects to rest the defense so we will have some idea when to have the instructions ready.

Mr. Andersen: We will be through at quarter of eleven.

The Court: Perhaps you should arrange now to get your rebuttal witnesses here.

Mr. Banfield: I will have to do that.

Mr. Andersen: Mr. Banfield and I, or Mr. Strayer and I discussed the matter of documents introduced in evidence. I presume the usual practices, either party may read them [966] even though not actually read at the time the witness was on the stand?

The Court: Yes.

Mr. Andersen: Your Honor seemed to be ruling that it should be done while the witness was on the stand.

The Court: That is only so far as the taking of testimony for the trial, so to speak, is concerned, but so far as exhibits, the reading of matters in evidence at the argument, it may be done.

Mr. Andersen: I just wanted to understand it.

LEONARD EVANS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Andersen:

Q. Mr. Evans, what is your full name?

A. Leonard Evans.

Q. And do you live here in Juneau?

A. Right.

Q. What is your position at the present time?

A. Territorial Representative, United States Department of Labor.

(Testimony of Leonard Evans.)

Q. How long have you held that position?

A. Since May 1, 1948.

Q. And prior to that time what was your position? [967]

A. Deputy Commissioner in the Territorial Department of Labor.

Q. How long had you held that position?

A. Since January 6, 1947.

Q. And prior to that time what had you done? Had you been in the Territory prior to that time?

A. Since approximately April 15, 1944, in the Territory, working in the United States Department of Labor as Wage and Hour Inspector.

Q. You, of course, are somewhat familiar with this dispute at the Juneau Spruce Corporation, are you not? A. I think so.

Q. Now, on or about April 10 of 1948, did you have a meeting with Mr. Hawkins?

A. The dates are not clear in my mind. It is possible that April 10, 1948, was a Sunday, so I wouldn't be exact on the day, but during the period immediately after this dispute occurred I called on Mr. Hawkins at the Company office.

Q. Did you have a conversation with Mr. Hawkins at that time? A. Oh, yes.

Q. Did you subsequently render a report, make a report regarding that discussion?

A. Yes. I was assigned as a conciliator and was to report back to Mr. Benson, Commissioner of Labor; yes. [968]

(Testimony of Leonard Evans.)

Q. Have you recently read the report—strike that. After your interview with Mr. Hawkins, did you make a report of what occurred at that meeting?

A. Yes.

Q. Have you read that recently?

A. I have reviewed it recently; however, I think it should be pointed out that—if I remember correctly —I made prior visits to the Company office either earlier or later. I made other visits to the Company office on the same matter.

Q. About how many visits did you make to the Company?

A. A combination of visits and phone calls, not less than four.

Q. Were they all in your capacity as representative of the Territorial Labor Department?

A. Yes.

Q. Do you recall your conversation with Mr. Hawkins on that day?

A. Some parts of it I recall quite well.

Q. Do you recall whether he mentioned anything or not about closing the plant at that time?

A. It was a phrase that was in general use; yes.

Q. Let me show you.

Mr. Andersen: Have you seen this before, Mr. Banfield? (Showing document to counsel for plaintiff.) [969]

Q. I will show you a copy of the report of April 10. Does that refresh your recollection?

A. Yes, except that the heading "Report of" and

(Testimony of Leonard Evans.)

so-and-so, is apparently identifying material added by someone else at a later date.

Q. Well, that isn't important.

A. That is my report.

Q. At that time, then, did Mr. Hawkins tell you that he would close the shop rather than——

Mr. Banfield: May it please the Court, we object.

Mr. Andersen: May I finish?

Q. At that time did Mr. Hawkins tell you he would close the plant rather than do business with the Longshoremen?

Mr. Banfield: We object.

The Court: It is a leading question unless the witness shows in some way that he has difficulty in remembering something.

Q. From that report, will you tell us the result of your interview—not the result, but the factual matter relating to your interview with Mr. Hawkins at that time?

Mr. Strayer: Your Honor please, if by that question counsel wants to show information in the memorandum, it relates to some matters not in the dispute.

Mr. Andersen: I will agree with that. It affects other Unions in there too, which apparently were discussed at [970] the time.

Q. But in relation to the Juneau Spruce Corporation here, from that report will you tell us what he stated in relation to the situation?

A. Well, the most important thing to me, of course——

(Testimony of Leonard Evans.)

Mr. Strayer: Just a moment. I object to that sort of an answer.

Q. You can't testify as to the most important thing to you. You testify just what was said.

A. All right. The thing first was this was a jurisdictional dispute. That was Mr. Hawkins' statement.

Q. Between whom?

A. Between the sawmill workers and the Longshoremen, and that he would not deal with the Longshoremen and that the comment had been made many times before in the plant and elsewhere that the Company would not deal with the Longshoremen and would close the plant down rather than deal with the Longshoremen. That was tied into Mr. Hawkins' statement that this was a jurisdictional dispute. I disagreed with him. He defined the jurisdictional dispute and this is part of our conversation—I think Mr. Banfield in part, previously, or in his office later —Mr. Banfield and me disagreed then and still disagree. Mr. Hawkins was using the same definition as Mr. Banfield. I was there as conciliator trying to reach any agreement. [971] The Department doesn't care who wins or loses. After their definition of jurisdictional dispute I saw it would be impossible to get the parties together.

Q. In the conversation did they define their idea of a jurisdictional dispute?

A. We each did. Jurisdictional dispute was defined in our conversation.

Q. Did Mr. Hawkins define his? A. Yes.

(Testimony of Leonard Evans.)

Q. What did he state?

A. That this was a jurisdictional dispute, defining it as one between a company and union over a division of work.

Q. Between the Company and a union?

A. Yes.

Q. In the conversation did you define a jurisdictional dispute?

A. I did, and I defined a jurisdictional dispute as a dispute between two unions over the division of work.

Q. With the employer being on the outside, so to speak?

A. With the employer not being directly involved in the controversy.

Q. Did you have any other—is that the gist of your conversation with Mr. Hawkins at that time?

A. It is the gist of the major part of it. I tried to get a meeting of the representatives of the sawmill, representatives [972] of the Company and representatives of the Longshoremen.

Q. Were you successful in getting Mr. Hawkins to agree to such a conference?

A. Either then or later I was successful in getting the three parties to meet for a very short time in the Commissioner of Labor's office.

Q. When was that?

A. If I remember right, it was a Friday afternoon.

Q. About when?

(Testimony of Leonard Evans.)

A. In the same week.

Q. Were your conciliations successful then or unsuccessful?

A. When we left I was hopeful. We had scheduled a second meeting for the following Monday. All three parties at that time indicated they would all show up. On Monday the Company representatives didn't show up. When I phoned to remind them they said "No soap—no meeting."

Q. That is, they refused to meet, did they?

A. Yes.

Q. Does this report also contain the gist of what you testified to, so far as the meeting of April 10 is concerned? A. Yes.

Mr. Andersen: I will offer it in evidence and we will delete the portions——

Mr. Strayer: I object. It is not in evidence. It is only a memorandum this witness made to refresh his memory, but it is not substantive evidence.

Mr. Andersen: Also, may it please the Court, it is an official record, a copy. They have the original in their files. It is a copy of an official record of the Territorial Department of Labor.

The Court: I think that the rule applied in a case of this kind, assuming it is admissible, being of an official character, it is not admissible except to rehabilitate or corroborate a witness who has been contradicted.

Mr. Andersen: May I offer it for identification then, your Honor?

(Testimony of Leonard Evans.)

The Court: Yes.

Mr. Andersen: For reference, more than for anything else.

Clerk of Court: The exhibit has been marked Defendant's Exhibit E for identification.

Mr. Andersen: You may cross-examine.

Cross-Examination

By Mr. Banfield:

Q. Mr. Evans, do you remember in talking to Mr. Hawkins and myself I made it perfectly clear to you that I didn't care whether you called this situation a jurisdictional dispute or not, but what it was was a dispute between [974] the Company and the I.W.A. —I mean between the Company and the I.L.W.U. Do you remember that?

A. I am sorry to say I don't, Mr. Banfield, but there may be a good reason for that. I was so disturbed by the difference of definition of jurisdictional dispute I might have missed the point of argument such as you make now.

Q. Do you remember saying that 8(b)4(D) of the Labor Relations Act only applied to a jurisdictional dispute between two labor organizations?

A. No, I have never—well, quoted the Labor Relations Act by number. I have never quoted a section of that Act by number. I have a good reason. I have never been an enforcement officer of that Act and I have never administered it, consequently I wouldn't try to quote it by number.

(Testimony of Leonard Evans.)

Q. Do you remember asking me for a copy of the charge filed with the National Labor Relations Board against the I.L.W.U., Local 16?

A. I remember.

Q. And it set forth a violation of a certain section of the Act?

A. The charge listed the facts and it listed the sections of the Act by number; yes.

Q. And you remember we discussed that particular section of [975] the Act which we claimed had been violated; do you remember that? A. Yes.

Q. And do you remember I stated this Act applied to an action by a labor organization to encourage or induce employees of an employer not to work, when done with the object of forcing the employer to assign the work to somebody else rather than the person to whom it is assigned; do you remember that?

A. I remember an argument along those lines. You see, my job was as conciliator, consequently I don't know. I am not informed and I don't pretend to be on the technical requirements of the Labor Relations Act. I could say yes and miss, because I am not familiar with it.

Q. Don't you remember you said there was just a dispute between two labor organizations contending for the same work?

A. I remember I felt that was the case, and I would make a statement along those lines, and I did.

Q. Do you remember that my position was I didn't care whether you called it a jurisdictional dis-

(Testimony of Leonard Evans.)

pute or what you called it, but it was a violation of the law as the law set it forth? You remember that, don't you? A. I believe so.

Q. Do you keep up on these labor cases and labor opinions? [976]

A. Not under this law. I keep up to date on Wage and Hour and on certain other laws, but I do not try to keep up to date on this Labor Relations Act. I have no official connection with it.

Q. Have you read the decision of the National Labor Relations Board in this particular dispute?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Is that——

Q. The decision which came out.

A. In this particular case—not in connection with this damage suit, but a question of whether or not——

Q. Yes.

A. I have read that, I believe, once.

Q. Do you remember what the opinion of the Board was?

Mr. Andersen: I object to that as incompetent, irrelevant, immaterial, may it please the Court.

The Court: Objection sustained.

Q. Has the Board adopted my viewpoint?

Mr. Andersen: I object to that as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Mr. Evans, hasn't the National Labor Rela-

(Testimony of Leonard Evans.)

tions Board, in that case, ruled that a jurisdictional dispute exists [977] when there is only an argument or a dispute between an employer and one labor organization?

Mr. Andersen: I am not going to object, but I assign the conduct as misconduct.

The Court: I think it is within the scope of the Court's previous ruling, and hence must be sustained.

Mr. Banfield: That is all.

Redirect Examination

By Mr. Andersen:

Q. Mr. Banfield mentioned and showed you a copy of the charge that had been filed by the Company against the Longshoremen's union. Did you also know what happened to that charge, which was discussed in your meeting with Mr. Banfield?

Mr. Banfield: I object, unless counsel wishes to open the door for the whole testimony.

The Court: Yes; objection sustained.

Mr. Andersen: May I state the reasons for it, your Honor?

The Court: Yes.

Mr. Andersen: On cross-examination they talked about a conversation that occurred there, just the conversation now. In the conversation that occurred there, Mr. Banfield apparently was talking and also asked him if in the conversation [978] he showed him a copy of the charge—I guess your Honor is probably right—wait just a minute while I read this. That is all, thank you.

Mr. Banfield: Thank you, Mr. Evans.

(Witness excused.)

Mr. Andersen: One other matter, may it please the Court. I realize your Honor previously made a ruling in relation to Exhibit C in evidence, that is, and with particular relation to Exhibit D for identification, and in relation to the testimony of Mr. Pearson. I understand your Honor has made that ruling, but as an officer of the Court, I always feel it my duty —I guess we can both recognize that occasionally even a Court can be brought back along the paths of righteousness, may it please the Court.

Mr. Strayer: If we are going to cite authorities, we also have some.

The Court: I am wondering if it isn't a situation in which the jury should be excused.

Mr. Andersen: I don't believe so.

The Court: Like an argument you might make in opposition to an objection?

Mr. Andersen: It will just take me a minute. I took the position yesterday and the jury was present, that contracts carried over from one employer to another. I, at that time, cited no authorities. At this time I cite National [979] Labor Relations Board vs. Hoppes Manufacturing Company, 170 Federal Reporter, 962-964—Federal Reporter Second—a very recent case under the Taft-Hartley Act. The Court said "The change of ownership in no way affects the obligation of the employer under the statute. 'It is the employing industry that is sought to be regulated

and brought within the corrective and remedial provisions of the Act in the interest of industrial peace' " and citing roughtly a dozen other cases, may it please the Court.

The Court: Do you contend that case is in point on the facts, or was it a dispute that had commenced under a previous ownership?

Mr. Andersen: In this case—yes, I contend it is very applicable.

The Court: In the case you cited, isn't that a case where a dispute arose under a previous ownership?

Mr. Roden: No, your Honor. The original owner of the plant had a contract with this Union. He sold out.

The Court: Was it a colorable sale or a bona fide sale?

Mr. Andersen: Bona fide, and it was stock in the corporation.

The Court: And did the purchaser assume the contractual obligation? Here there is positive evidence that the new owner—— [980]

Mr. Andersen: The new owner could not escape. The industry was regulated, not the parties.

The Court: Didn't the dispute involve industry, as distinguished from a plant like this?

Mr. Andersen: Not materially. I think the situation is exactly the same as here.

The Court: I don't mind looking at that case, but it is difficult for me to believe that in view of the testimony introduced on behalf of plaintiff, very positively to the effect that there was no intention

to assume and no assumption of a contractual obligation for the predecessor, that they could be bound nevertheless.

Mr. Roden: Your Honor, if a contract as a matter of fact exists between the Juneau Lumber Company and the Longshoremen, how could the Juneau Lumber Company cancel that contract or abrogate it without the consent of the Union without laying itself open to damages? A contract was in existence. If I make a contract with somebody and sell, and he says, "Never mind, Roden——"

The Court: Don't contracts end when one of the parties dies or sells out?

Mr. Roden: No, your Honor. There is cited in this very case where one of the parties died in this Pacific Second, or Federal Second; they tried to escape an order of the National Labor Relations Board. If it ran against the [981] partnership, or rather than the surviving partner, and it was no longer effective because my partner died, an operation of law became terminated. It was not your partnership being regulated, but your industry, both under the Wagner Act and the Taft-Hartley Act, and you could not escape a contract with a Union while a partner was alive.

The Court: It would seem to me that will involve argument at some length, because apparently your opponents don't agree with you.

Mr. Roden: I didn't agree myself.

The Court: What is the purpose of calling it to

the attention of the Court at this time—so that the matter may be set for argument?

Mr. Andersen: No, I don't intend to labor the point. I wanted to mention this case and the fact that it is the policy of the law as set forth in the Taft-Hartley Act to regulate industry or business engaged in interstate commerce. The policy of the law is to try and make certain there are no labor disputes. For instance, under the Act, as your Honor knows, if two labor unions are claiming jurisdiction——

Mr. Strayer: Pardon the interruption. If he is going to argue, I will ask for further argument.

Mr. Andersen: I was about finished.

The Court: If you were about finished—but it seems to me it should be made in the absence of the jury. [982]

Mr. Andersen: I can conclude in just a moment. In relation to the other aspects of the case, we contend in view of this authority and the Taft-Hartley Act, that any time a factual dispute is raised with respect to the issue, whether or not there is a contract, that is a matter for the jury to determine, rather than a law determination. Irrespective of the Taft-Hartley Act or Labor Management Relations Act, with particular reference to the public policy set forth in the latter Act, the purpose of the Act is to regulate, not any particular thing, but to regulate the industry. The Act isn't concerned with feelings of individuals.

The Court: I get your point.

Mr. Andersen: That is the point I wanted to make. I direct it to your Honor's attention.

The Court: My ruling yesterday on the other point that the facts show sufficient to warrant admission of the offered exhibit in the evidence is that there was not a sufficient foundation in the evidence for its production. I adhere to that ruling now. I do not think that the facts put in evidence on your behalf constitute a sufficient foundation to admit these offered exhibits in evidence, but as to the point raised now, I will have to reserve ruling until I can examine the authorities. As I understand it, so far as that particular point, its decision or ruling by the Court would not necessitate taking further testimony? [983]

Mr. Andersen: No, your Honor. Pardon me, that is not correct, as I look at it.

The Court: Why? Isn't it a pure question of law here?

Mr. Andersen: Yes, but if your Honor were to rule with us then, of course, there would be more evidence.

The Court: If it is a matter of law, why would there have to be more evidence, on what point?

Mr. Andersen: Maybe we are not talking——

The Court: I am talking about with relation to the authority.

Mr. Andersen: Exhibits C and D for identification, if the decision went in our favor——

The Court: I have already decided to adhere to my former ruling.

Mr. Andersen: Then, if you decide one I think you automatically decide the other.

The Court: No.

Mr. Andersen: Then if you decide one in our favor, I think more evidence would be necessary.

The Court? Why?

Mr. Andersen: Because the contracts would go in.

The Court: They are in.

Mr. Andersen: Then I want to interrogate witnesses regarding them, your Honor, if there is a question of law [984] pursuant to that.

The Court: If it is not necessary then we can postpone argument on that question until, say, one-thirty. If it is going to necessitate taking further evidence it seems to me the Court will be required to hear argument now in the absence of the jury.

Mr. Andersen: Whatever your Honor wishes.

The Court: It isn't what the Court wishes, it seems to me what the Court would be compelled to do.

Mr. Andersen: Precisely.

The Court: I assume counsel wish to argue the point in support of which this authority is cited?

Mr. Strayer: Yes, your Honor.

The Court: Are you ready to proceed?

Mr. Strayer: If I understand the point—I am not sure that I do. I would like to hear counsel on it.

The Court: The jury may be excused until called.

(Whereupon, the jury retired from the courtroom.)

Mr. Andersen: May I then briefly state my position?

The Court: Yes, on the second point.

Mr. Andersen: I understand, your Honor. Your Honor is only concerned at this point with the bare position of law with the carrying over of the contract. That is the question.

Mr. Strayer: That is the question that has been decided, your Honor. [985]

Mr. Andersen: No, the question the Court has not finally decided.

The Court: I have assumed heretofore there is no assumption of contractual relation and it is not binding on the plaintiff.

Mr. Andersen: Yes, your Honor. That is the point to which we address argument and that is the only point to which we address argument. In order to have a full understanding of that, may it please the Court, reference of course should be made to certain portions of the Taft-Hartley Act or Labor Management Relations Act, as it is referred to. I might add, in the case I cited, the Court indicated that under the old Act, that is, the Wagner Act or the present—this case being decided under the present Act, the Court held the rule of law to be the same. The public policy of the Taft-Hartley Act I have directed to your Honor's attention several times. It has provisions in it, for instance, that if two unions claim jurisdiction over a cer-

tain type of area of work the employer may immediately file a complaint with the Board and have an immediate certification, or rather investigation, by the Board Agent, and if the Agent makes a determination that there is a dispute between two unions, then the Board may immediately hold an election to determine who represents the workers. Not only the Act but the rules of the Board are so geared, may it please the Court, that [986] those matters can be handled with the greatest expedition to the end that there be no cessation in interstate commerce. That shows the extent to which public policy is involved in the Act. The Act has other provisions about conciliation and how parties must negotiate in good faith to the end that agreements are reached. All the way through public policy is set forth in the Act, allegedly in the relation of the public welfare, in relation to John Jones or the Spruce Corporation, or any other corporation or business, and theoretically, is it concerned with a union or person, whether that person be an individual, associate or cooperative, the Act theoretically has no interest in those things. It ill behooves a man to say "I want to hire John Jones in my lumber yards." They consider that immaterial under the law. So many man-hours go into the work and any able-bodied man can perform so much work. It is the general public policy with which we are involved, and it is so contrued, always along the lines not paying too much attention to the individual because it couldn't if it were to administer

an Act designed for general welfare. Individuals, unfortunately, fall along the line occasionally in our system, because it has long been said an individual must be subverted to the good of the whole sociological system, the good of the greatest number with which the Government is concerned. I think we can agree on that.

Many years ago under the Wagner Act there was, as I [987] recall, a shoe manufacturing company that crossed state lines, was in one state and had a contract with the Union and changed ownership, as I recall, and moved into another state, and the issue was whether the contract went with it. The Board held it did.

The Court: The contractual party was the same. One of the parties there was a party sought to be bound with the same party, was it not?

Mr. Andersen: The Board—as we look at it, the Union was the same, but the employer wasn't the same. They had completely changed their location, changed state lines.

The Court: I thought you said the employer moved?

Mr. Andersen: Over the state line, from one city to another.

The Court: Isn't he the same person?

Mr. Andersen: Certainly, but my recollection is he not only changed location but changed ownership. The other cases are all to the same point, and that is that the employing industry that is sought to be regulated is sought to be brought

within the remedial provisions of the Act. The change of ownership in no way affects the obligation of the employer under the statute. In other words, it is the policy of the Act, may it please the Court, as I see it. Here is a large corporation. The testimony is two million dollars or something like that. It employs a hundred, two [988] hundred or three hundred men; I think the figure was around two hundred and seventy-five men, if I recall, your Honor, from one of the witnesses' testimony that it was around two hundred and seventy-five men. They testified they wanted to cut fifty million feet of lumber. It seems to me a lot of lumber. Substantially, it is under interstate commerce, so here is an industry with which we are concerned and, not only this, but the whole lumber industry, so to speak. What, therefor, is the best interest of the public policy, the Board's position, the philosophy of the Board's position is this: here is a lumber company. We have to assume they operated efficiently, as matter of law. Whether they operated efficiently or inefficiently, so far as the rule of law is concerned, the mill operated with two hundred and seventy-five men working.

They talked about the Juneau Lumber having a contract with the I.W.A. They have a contract with other Unions, I assume, other Unions, ordinary workers and carpenters and so forth in the operations, and they have a contract with the I.L.W.U. The evidence is clear. They didn't even tell the I.L.W.U. they were cancelling any contract. All

they did was in a contract between themselves, that is, the two corporations, agreed they wouldn't carry over any contracts. That is all they agreed to. That could even be construed—but I don't make the point—it could mean a pecuniary or [989] monetary obligation. We don't necessarily make that point at this time, but whether this type of contract is that type of contract—if there is a distinction between contract and agreement, simply agreements relating to hours of work and rates of pay, that is all they ever had in them—it simply means under this collective bargaining idea that a pool of labor is made available to the employer from which he can draw as the business or industry desires. It is the public policy of the Act that that reservoir shall be created and maintained for the benefit of the industry.

That is the case. As I understand them to say it is against public policy to interrupt those relations, because the Board assumes—and there is no evidence here to the contrary—the Board here assumes those relationships are created by this agreement to which I refer for the interest and for the benefit not only for the particular industry involved, but for the public good or welfare as a whole. The evidence here in this case is absolutely void of any showing that the relationship between the Juneau Lumber or Juneau Spruce and Local 16 wasn't a profitable one for each but both of them.

Mr. Schmidt wasn't asked any questions on the

point, so it must be assumed all their relations were satisfactory. It is certain that for at least ten years the Juneau Lumber got all their longshore work from the Longshoremen. There is no question about that at all. Mr. Schmidt's testimony was [990] he carried on thereafter in the same way with the Longshoremen without telling them a word, hired them in the same way, paid in the same way, gave them a raise in the same way. It is not all a part of Mr. Schmidt's testimony, but it is the same thing. What is public policy on things like that? Does it mean every time there is a change of ownership or a partner dies that there is a sale of part or all? The employer stays the same; the only thing that happened, it was improved. The mill Manager remained the same person, the principal Manager, Mr. Schmidt, because Mr. Hawkins testified he was away at least half the time. The man who did the hiring remained the same, and supervised the work—he remained the same. I can't conceive a policy of the United States, as expressed in the Taft-Hartley Act, that under such circumstances a sale could be made by one corporation to another and thereby cut off contractual relations existing for ten years in the interest of industry and the country, without one bit of evidence between the employer and employee that they have not contributed to the interest of the United States, so when it came up in this particular case under substantially the same conditions, may it please the Court, the Court said, "It is the employing industry that is sought to be regulated

and brought within the corrective and remedial provisions of the Act, in the interest of industrial peace." "The change of ownership in no way affects the obligation of the employer" [991] and, of course, speaking of the new employer, "In no way affects the obligation of the employer under the statute." The facts were somewhat like this, may it please the Court—I will read the syllabus—it is something like this: there was a business and there was a complete change in the ownership of the business, complete new policy, complete new everything, and a new outfit came in and decided they weren't going to do business with the Union, they were going to close their plant. That is the language in the case. The National Labor Relations Board Examiner made a complete finding. They were going to close the plant before they would do business with the Union. They didn't even know that there was a contract with the Union, that the plant had made a contract. They weren't even aware of the fact that a contract had been made when they bought this business.

The Court said it didn't make any difference whether you knew or not, what we are interested in is freedom from industrial strife. You had your contract, had your agreement; therefore, it carries over until it is cancelled with the consent of the parties. That is, in effect, what the case holds, may it please the Court, so I respectfully submit to your Honor that is not only the clear statement of pub-

lic policy as set forth in the Act itself, and as I argued the other day on the motion to dismiss, I thought your Honor was at first impressed with my argument there, because I think [992] that argument, plus this argument, plus these cases, merely show what the policy of the United States is with relation to keeping industry in operation. The undisputed evidence is that after it was taken over it was carried on just as before, without any difference at all, and then the Longshoremen heard that they were loading sea-going barges, so they went down there to talk to them about it; in other words, it was a grievance, as the term is used in labor relations. They said, "We would like to talk to you about loading this lumber." Mr. Hawkins, who was in charge, according to all the evidence, said, "I refuse to negotiate. I will close the plant before I do business with the Longshoremen. I have nothing to talk to you about." All those phrases were used, as far as Mr. Hawkins is concerned; as a matter of fact—and again I am addresing myself to the same point—whereas, as a matter of fact, there was no reason under the Act why he didn't simply say to the Longshoremen, "O.K., I will sit down and negotiate the question with you." There was no reason why they couldn't come together and file a petition. Your Honor will recall there was no dispute at that time. The only dispute —possibly I am anticipating a point that has been mentioned here from time to time about interfering with the right of the Company to hire a man whom

he may want to hire—that is in issue here, that is completely foreign under the Act. Certainly under the Act the employer may hire men who don't belong to a Union. [993] Certainly that is true; there is no question about that. What this whole idea of an employer entering into a contract with a man for a dollar a day, common sense and legislation—certainly an employer has a right to hire, but we must make a distinction. The question here was whether the Longshoremen were pursuant to their contract, custom and practice, had a right to go in there and negotiate for this work, particularly when the I.W.A. said they didn't want it, so again we come up against this, flush with this, as I have said, if this case—and it has not been overruled—how can management say, "We bought this plant that the other one carried on for years. We didn't advise you the contract was terminated after May 1." They gave raises and carried on as before. Such is the evidence, and they then say finally they wouldn't even negotiate.

The law, as I see it in the light of public policy and light of these cases, is a matter of law. The contract carried over.

I will not argue the other matter the Court indicated he ruled on.

Mr. Roden: We probably have never sufficiently appreciated what the policy of the Taft-Hartley Act, or for that matter, the Wagner Act, has been. I am frank to say I never did, until I ran across some of these cases.

The Court: Is this the latest case on that? [994]

Mr. Roden: Yes; November. I think November 28.

Mr. Andersen: The twenty-eighth of November last year.

Mr. Roden: Terminating a contract only if for value of services which could only be performed by the person whose death has occurred, if an ordinary contract for construction of building, no doubt his estate would be required to carry out the contract. As I said a moment ago, the Court holds —yes, your argument is right when this partner died, under the common law rule, that partnership was dissolved, but that is no longer applicable, since the Taft-Hartley Act, or the established public policy in which the public principally is interested and not the two parties concerned. That is what I believe.

The Court: You mean public interest overrides?

Mr. Roden: The private interest.

The Court: And also it would follow from your argument that it would override certain principles of law that were looked on as fairly well established.

Mr. Roden: I didn't hear the last, your Honor.

The Court: I say, it would also follow that the public interest would override certain principles of law that would appear to be somewhat well established before.

Mr. Andersen: Just that the Wagner Act made employers bargain, which absolutely conforms to the common law. [995]

The Court: But your argument now is a statutory provision instead of, you might say, the policy or something like the public interest implicit in the Act.

Mr. Andersen: We are arguing that the public interest is implicit in the Act.

The Court: But it is subject to statutory provision, and I don't think the comparison is very apt.

Mr. Andersen: I don't follow your Honor.

The Court: In one case, if there is a provision of the statute dealing with the point, you don't have to rely on implication from public policy or interest. You are in a better position, aren't you?

Mr. Andersen: Under the Taft-Hartley Act we have a statute which itself appraises public policy of the United States in relation to all things that are brought within its purview.

The Court: I understand.

Mr. Andersen: The Act says—it repealed the Clayton Act——

The Court: I understand all that, but you can't point to a specific provision repealing some law providing that a contractual relation shall not be forced on him. There is a difference. In one case we might rely on specific statutory provisions, and in the other case we don't have it. Have you anything? [996]

Mr. Banfield: We would like to point out that counsel avoided telling how the transfer took place, or if it was the same organization. I think the Court would like to see it, and we would.

The Court: How is the Court going to see it if you also want to see it?

Mr. Roden: The case is short.

The Court: Do I interpret the remarks of counsel now as desiring a recess?

Mr. Banfield: Yes.

Mr. Strayer: We just want time to look at it.

The Court: How much of a recess?

Mr. Banfield: We can read it out loud.

The Court: How much recess do you wish?

Mr. Banfield: We don't care for any. We can read the case.

Mr. Roden: I think we should refer to the authority to get the idea.

The Court: If you have to look at other authority, probably you will need a recess.

Mr. Banfield: If it is not in point, "In this case the National Labor Relations Board asks for enforcement of its order finding respondent had restrained and coerced its employees in violation of Section 7 of the National Labor Relations Act, and had refused to bargain collectively as required by [997] Section 8(5) of the same statute, 29 U.S. Code, Section 157 and 158.

"The case presents primarily a question of fact. It arises out of the following circumstances, which for the most part are not controverted.

"The controlling interest in respondent"—that is the Hoppes Manufacturing Company—"Was owned by John W. Hoppes, who prior to his death in 1945 was heavily indebted to a local bank. In order partly

to protect the bank's loan, H. E. Freeman, president of the bank, and B. A. Mayer, president of the Bundy Incubator Company, and also director of the bank, on August 27, 1945, purchased the entire block of Hoppes's stock." I imagine Hoppes Manufacturing Company is a corporation. I haven't found where it says so. "Mayer's principal interest in the matter was to acquire the plant building as a storehouse for the Bundy Incubator Company. Freeman and Mayer intended at first to close the business, but later, at the intercession of Forrest R. White, general manager of the respondent, they decided to operate it experimentally for about a year. The business had never paid dividends; it had broken even since 1941.

"The plant, which makes feed water heaters, at the time employed eleven men. Shortly before Freeman and Mayer purchased the stock, a consent election had been held at which the U.A.W.—C.I.O. had been chosen as bargaining representative, [998] but Freeman and Mayer were not aware of this circumstance until about a week after they started to operate the business.

"The new set-up was not particularly well organized. Freeman had nothing to do with the management, which he left to Mayer and White. He said frankly to one of the United States conciliators that he was 'thoroughly indifferent to the operation of the plant' other than his natural reluctance to drop some men where they had worked for many years."

If the Court please, I don't believe I need go on. It simply shows the corporation owned the plant and

some bank directors decided to buy some stock and the entity went right on. Isn't that the case?

Mr. Andersen: Your treatment of it isn't novel. I suggest you read it all.

Mr. Banfield: All right. "Mayer was absent during some four weeks of the critical phase of the controversy. He had rented a quarter of the plant building for warehouse space and thus had attained his main purpose in buying a share in the business. While Mayer primarily represented the owners in the management, he gave no instructions to White as to how to deal with the union and, due to his absence from the city, he at no time met with the United States conciliator.

"The Board found that shortly after Freeman and Mayer took over the business, statements were made by both the superintendent and the manager to the effect that the plant would [999] be closed if the union came in. This finding is conclusively supported by the record. The factory superintendent told two of the men that there had been a change of ownership and that 'as far as the Union was concerned, it wouldn't tolerate it. . . .' He further said that if the employees would not give up the union he would have to close the plant.

"Richardson, an employee, testified that White, the manager, told the men in a general meeting that 'the place had changed hands, and that he thought that Mr. Mayer would be a man that would be glad to meet us all squarely, and told us at that time he didn't think that the Union would be a necessary thing for

the employees there at the plant, and he did say, too, that Mr. Mayer would not have the Union in the plant.' In answer to a question as to what would happen if the employees persisted in their desire to have a union, White said the company 'would have to close it down'."

First point of law, "The respondent does not seriously controvert these statements, but points out that the company had never operated at a profit, contends that it was the right of Mayer and Freeman to discontinue operations at any time, and that the declaration that the plant would be closed therefore did not constitute an unfair labor practice. But the statements quoted were more than a mere notice of discontinuance due to financial failure. They constituted a threat to discontinue unless the union was dispensed with, [1000] and this was clearly coercive under the statute." In other words, an interference with a man's right to join or not join a union.

Second point of law, "While Freeman and Mayer were confronted with an unexpected situation and they personally did not oppose the union, they authorized White to represent them in the negotiations with the union, and they are bound by his acts. The change of ownership in no way affects the obligation of the employer under the statute. 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.'" Then there are some cases cited.

Third point of law, "As to the refusal to bargain,

a similar conclusion is required. At the one meeting between the union representatives and White on June 7, 1946, White listened in silence to the reading of the proposed contract which had already been delivered to him, until the section dealing with wages was reached. He then declared in effect that no increase in wages was possible and that if that was the principal issue, the negotiations might as well close."

The Court: I don't think those matters you are now reading are of any materiality here. I think the question is whether there was a change of ownership or merely a change of ownership of stock. What about those other cases cited, have [1001] counsel examined them?

Mr. Andersen: Your Honor, this case doesn't treat change of stock at all. The case talks about change of ownership.

The Court: But what it was was the ownership of stock, wasn't it? It would be merely dictum.

Mr. Andersen: Your Honor, maybe it is dictum.

The Court: That is the use of the words "change of ownership" where you are dealing with nothing but ownership of stock.

Mr. Andersen: It would have been idle for this if the Court was only concerned with the change of stock in a corporation, then the Court would have said that the employer remains the same. The fact that stock might remain the same—I am sure your Honor will agree with that. Instead of that, the Court cites all the cases and says it is not concerned with the change of ownerships, simply the industry.

The Court: Courts have always made general statements, not full import, without regard to the facts. The facts in this case show a change of ownership.

Mr. Andersen: It doesn't have four white paws and a star in the middle of its forehead. I have never been able to find that sort of case.

Mr. Roden: First of all, may it please the Court, the change of ownership shown in this case, if there was [1002] ninety nine per cent of the stock sold, what difference does it make whether there is a deed to the property or whether he assigns stock to them. This little fiction that a corporation is one entity and the man who holds all the stock in it is another entity is of very little importance at any time. The question is, what is the actual situation? If I hold the stock in the corporation I am the owner of assets.

The Court: But here it was a new organization. It wasn't the old one. It was a new one. It was not merely a sale of stock.

Mr. Roden: All right. The quotation here is that a transfer of ownership is of no consequence. It is a liberal interpretation of a former decision in the previous authorities here.

The Court: Have you examined the other authorities?

Mr. Roden: I have. 87 Federal Second.

Mr. Strayer: Which case is that?

Mr. Roden: 87 Federal Second, I think is here used for the first time.

The Court: But was there a complete change of

ownership, or merely a change of ownership of stock?

Mr. Roden: I cannot answer that question correctly, your Honor.

The Court: It still looks like we will have to take a recess to examine these authorities, because counsel disagree [1003] to their effect.

Mr. Roden: I think this is significant at the end, "Whether the case be considered as governed by the original National Labor Relations Act of 1935, or by the Labor Management Relations Act, enacted June 23, 1947, the conclusion is the same. Under either statute there is ample support for the findings of the Board." It all comes back to the Wagner Act and the Taft-Hartley Act here in the interest of the public and not to create, so to speak, any rights in an employer or in an employee which are superior to the rights of the public.

Mr. Andersen: We have one other matter. Advance Sheets 172 Federal Second, it would be the same volume.

The Court: You say 170?

Mr. Andersen: 172, your Honor. In this case there was a corporation——

Mr. Strayer: Might I have the page number?

Mr. Andersen: 459. In this case there was a corporation. The men split up, and one formed a partnership with his wife, left the corporation and formed a new entity.

The Court: He just took on a different name.

Mr. Paul: He went into——

Mr. Andersen: He left the corporation and

formed a partnership with his wife. The labor contracts had been in existence. This doesn't have four white legs with a star on [1004] its forehead, but subsequently unfair labor practices arose.

The Court: Did he leave the plant, or just the corporation?

Mr. Andersen: He left the plant and the corporation.

The Court: And set up his own plant?

Mr. Andersen: He apparently bought, as a partner—he split away from the corporation, this corporation had several plants. He left the corporation completely—he and his wife bought one of the plants and he operated separately and apart from the corporation with his wife. Those are the facts.

The Court: Was it found to be a subterfuge?

Mr. Andersen: No, your Honor, there was no question about that. The way the question came up, there was nothing in here at all about subterfuge. I am willing to argue the point if it will do me any good.

The Court: I haven't indicated you shouldn't argue. I am giving you an opportunity to argue.

Mr. Andersen: Labor disputes arose apparently with respect to both. The partnership said it had nothing to do with the corporation. Charges were filed against the corporation of unfair labor practice, and also arose with respect to this new partnership, and the objection came before the Board on the consolidation of them both for hearing, and that is the question that came up before the Court on enforce-

ment [1005] and the Court just disposes of the question just formally.

The Court: What did it hold?

Mr. Andersen: It joined both despite their entities and here——

The Court: If it joined both it must be on some ground. What was the ground?

Mr. Andersen: I will read the syllabus. "Proceedings on charges of unfair labor practices against corporation and against partnership which was alleged to be partial successor to corporation were properly consolidated before Trial Examiner of National Labor Relations Board." That is the only important aspect of it. It bought the plant. It was a partial successor. It bought one of the plants and the partnership carried on the same type of business. It bought from the corporation. It was a partial successor; nevertheless, it is bound by the same contract.

That again shows the public policy with which we are here concerned. I again tell your Honor I don't know of a case off hand that is four square. This again sets forth the public policy. Here is a clothing manufacturing business, a corporation. One man pulls out from the management of the corporation—he may have remained one of the stockholders, but that is immaterial, according to Mr. Banfield—he pulls out and forms a partnership with his wife in the same business, and is held by a contract of the former corporation. Public [1006] policy which says two people engaged in interstate commerce who have to continue peaceful labor relations can't get out by

selling to another corporation, or, like your Honor said, by subterfuge, but there is none here.

The Court: Except one of the former owners continued under the old name. Here Mr. Rutherford——

Mr. Andersen: Mr. Schmidt continued. He was the same man.

The Court: One particular corporation, particularly a large one, if it changes hands and undergoes a change, someone always remains, but that doesn't give it the character of being the same. We will take a recess for fifteen minutes to allow counsel to examine the authorities.

Whereupon Court recessed for fifteen minutes, reconvening as per recess with all parties present as heretofore and eleven of the twelve jurors all present in the box; whereupon the trial proceeded as follows:

Clerk of Court: The jury is present, with the exception of one.

The Court: Have the defendants any other witnesses to put on?

Mr. Andersen: Not this morning.

The Court: Any time?

Mr. Andersen: We are awaiting your Honor's ruling.

The Court: Ladies and gentlemen of the jury, you [1007] are excused until two o'clock.

Mr. Banfield: We have one rebuttal witness out of order that would take about five minutes.

Mr. Andersen: One of the jurors is missing. I understand the juror—I heard someone mention the juror was under the impression he was excused and went home.

Whereupon the absent juror entered the jury box.

The Court: Mr. McKenzie, no juror can afford to pay a fine out of his pay as a juror. You should not be late if you can help it. I was going to excuse the jury because I thought you wanted to be heard.

Mr. Andersen: Mr. Banfield said he had a witness out of order.

Mr. Banfield: It would only take about five minutes. The witness would like to leave this afternoon.

The Court: Very well.

EUGENE S. HAWKINS

called as a rebuttal witness on behalf of the plaintiff, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Mr. Hawkins, how many meetings have you had with Mr. Peterson?

A. Just one, I believe.

Q. When was that meeting? [1008]

A. April 9.

Q. Are you sure it was the day before the picket line was established? A. Yes.

Q. Was there a meeting on the evening of the seventh of April or eighth of April which Mr. Peterson and certain members of the I.W.A. and I.L.W.U. were present? A. No.

Q. Did you ever have any meetings in the evening about eight o'clock, or at any time after six o'clock with the members or committee of the

(Testimony of Eugene S. Hawkins.)

I.W.A. and committee of the I.L.W.U.?

A. No; not both together.

Q. Now what evening meetings did you have?

A. I had one evening meeting with the I.W.A. in October, 1947.

Q. In October, 1947. Was Mr. Peterson there?

A. Yes.

Q. And now, at that meeting was there anything said about you knowing the answers, some such phrase as that? Do you remember some such thing being said?

Mr. Andersen: What meeting are you talking about?

Q. The meeting in October, 1947.

A. Yes. As that meeting broke up the statement was made by Mr. Card in reply to a statement made by Mr. Peterson, I believe, that Mr. Card stated he also knew some of the [1009] answers to labor problems.

Q. Mr. Hawkins, let me refresh your memory. In October, 1947, Mr. Card arrived here and you had two meetings that day, did you not?

A. Yes.

Q. When was the first meeting?

A. About two in the afternoon.

Q. And who was there?

A. The representatives of the I.L.W.U.

Q. Was the I.W.A. there?

A. Not in the afternoon.

Q. Was that the time that the I.L.W.U. asked Mr. Card for a contract? A. Yes.

(Testimony of Eugene S. Hawkins.)

Q. And was there anything said at that meeting of the afternoon of October 29 by any of these Longshoremen regarding "We know the answers." Did anyone make that statement?

A. That statement was made several times, and it is confusing to remember just——

Q. But who made the statement?

A. Mr. Card made the statement, that is——

Q. How did he happen to make this statement?

A. Upon leaving—I just can't quote the words they did say.

Q. Was there any such a meeting on October 7 or 8?

Mr. Andersen: You are talking about October 7 and 8? [1010]

Q. Yes. With Mr. Peterson? A. No.

Q. How many meetings were there between April 1 and the time the picket line went on, with I.W.A. representatives?

A. I believe just one.

Q. And that was on what date?

A. The ninth.

Q. Was the I.L.W.U. present? A. Yes.

Q. Was there anything said at that time regarding anyone knowing what all the answers were?

A. No. There wasn't much discussion there, just a few words.

Q. Was there anything said at that time about closing down the mill?

A. On their part, they were to put the picket

(Testimony of Eugene S. Hawkins.)

line up and the I.W.A. was not going through it, but we had no intention of closing the mill, other than being forced to.

Mr. Banfield: That is all.

Cross-Examination

By Mr. Andersen:

Q. Just a few questions. You say the meeting was on April 9 instead of April 7? You did have a meeting at which Mr. Peterson was present, didn't you, in the first part of April? [1011]

A. I don't recall no meeting the first part of April.

Q. I beg your pardon?

A. I don't recall one on the first.

Q. Both the seventh and the ninth are in the first part of April?

A. I meant prior to the ninth of April.

Q. Do you recall a meeting on the seventh?

A. No.

Q. The meeting you referred to is a meeting before the picket line went up, is that correct?

A. Yes.

Q. Is that the meeting where some Longshoremen were present; that is, a committee of Local 16 and a committee from I.W.A. came and said that I.W.A. had passed a resolution for the Longshoremen to do the work and they wanted you to turn the work over to the Longshoremen? Was that the meeting?

(Testimony of Eugene S. Hawkins.)

A. As I recall, that wasn't the wording of what transpired.

Q. But substantially—I don't want to hold you down to the exact words? A. Yes.

Q. That was substantially what was said?

A. Yes.

Q. The Longshoremen said in this meeting, said that they had done the work for the Juneau Lumber Mill, that they had a [1012] contract with the Juneau Lumber Mill, and wanted to negotiate with you now for this new work that you were doing about these barges? Was it substantially that?

A. I don't know. At that meeting there was very little said, and they made the statement if I didn't agree after this to negotiate that the next day there would be a picket line put up.

Q. They wanted you to negotiate and you wouldn't negotiate? They said if you didn't negotiate they would put up a picket line?

A. Yes.

Q. And you said you wouldn't negotiate?

A. Yes.

Q. Wasn't there something said at that meeting that they had done all the longshoring for Juneau Lumber and were also hired by Juneau Spruce to do longshoring work, wasn't there something like that said, too?

The Court: This seems to be going into the whole thing.

Mr. Andersen: Counsel went into this conversation. I am going into conversation.

(Testimony of Eugene S. Hawkins.)

The Court: But only for the purpose of attempted refutation of some statement by one of your witnesses or attributed to this witness by one of your witnesses.

Mr. Andersen: There is no objection. [1013]

The Court: No, but the Court has got to try to expedite the trial, too. It looks now like we might not finish this week. I rule it is improper cross-examination to go into anything not gone into on direct examination.

Mr. Andersen: That cuts me off, your Honor.

The Court: If that is the effect—it is intended to preclude you from going into something gone into by this witness the first time he was on the stand.

Mr. Andersen: That is all.

Mr. Banfield: That is all.

(Witness excused.)

The Court: Ladies and gentlemen of the jury, you may now be excused until two o'clock.

(Whereupon the jury retired from the courtroom.)

Mr. Banfield: May it please the Court, I have examined some of the cases cited by counsel and which are cited in Volume 170 and Mr. Strayer has also examined some. One of the cases referred to there is a case of National Labor Relations Board vs. Blair Quarries, Inc. That is where a company called "Granite" operated to 1944 when it leased

it to Blair. The Court, in discussing the issues, stated that there had been unfair labor practices which had been committed by Granite, the first operator, and that the superintendent of the Blair had performed certain unfair labor practices while being employed by Granite and that those practices continued after [1014] Blair took over and were committed by Blair while the superintendent was in Blair's employment. The Court says you can best understand the nature of the unfair labor practice through threatening and coercing the employees by understanding the whole practice. Granite, in fact, pleaded guilty, paid back pay and made certain amends which resulted in the Board discharging the charge against Granite, but Blair committed the same acts and was employing the same people.

The Court: There was no change of ownership?

Mr. Banfield: There was a lease by Granite to Blair. There was a new operator, but Blair is not charged as a result of any contract. It deals entirely with unfair labor practices threatening employees and no contracts, and it is only consolidated for hearing. One charge was dismissed. There was a charged against the subsequent owner after the lease was put in effect.

The other case is National Labor Relations Board vs. Baldwin Locomotive Works. In that case Baldwin Locomotive Works was under a debt to the Federal Government which put it in bankruptcy because it didn't pay an R.F.C. loan, but permitted

Baldwin Locomotive Works, as debtor in possession, to continue to operate these properties for the account of the bankrupt estate, then as they were discharged from bankruptcy, Baldwin Locomotive Works continued on in the possession of the property as the sole owner, and the Government had no further [1015] interest in the matter. There had been unfair labor practices committed by Baldwin Locomotive Works during the bankruptcy and continued on into the period that Baldwin Locomotive Works owned it. The Court said that Baldwin Locomotive Works was the operator of the property at all times and that Baldwin Locomotive Works was liable for its unfair labor practices to begin with and afterwards. It was the same, identical person who committed the acts. It says the fact that the United States had an interest in it under the bankruptcy law didn't make the operator come under that.

Mr. Strayer: Where there has been any holding, your Honor, that my ability can be vested upon a successor, it has been based either on subterfuge to avoid a Court order or common identity, passing from first to second or something of that kind. That is true. The case in 170 Federal is obviously of that type, because there was a passage of stock from the corporation and the corporation as an entity carried right on into the second operation. In the Adel Clay Products Company cited in the 170 Federal Second case, the original stockholders who had bargaining contracts when they dissolved,

broke up the corporation and formed a partnership—each of them were in that and were precisely the same and in the same proportion as in the former corporation. You can trace the identity. The Baldwin Locomotive Works was on a void Court order, 172 Federal Second is actually an authority for us instead of counsel. It is a case where originally it was a corporation and the president withdrew and sold his stock and formed a partnership with his wife in a business. The charge by the Board was against the corporation and partnership on the theory there was a continuing relationship. Of the operation, the Trial Examiner found no continuing relationship. It was contended it was error to join them in the same proceeding before the Board. That is a procedural matter and all the Court said was it was not proper. If there had been a continuing relationship there, it would have been entirely proper to hold them in the same proceeding. I think it is most significant and persuasive. All cases counsel cited are cases in which Federal Courts have sustained the continuing relationhip or common identity and the most recent is the National Labor Relations Board charges presumed to be rendered in this very dispute here. That was considered by the Board here and virtually the same facts were offered in evidence in this case.

The National Labor Relations Board held, as your Honor undoubtedly knows, that there was no obligation binding on the Juneau Spruce Corporation.

The Court: I haven't had a chance to read that yet.

Mr. Strayer: The pertinent part is on page 8.

The Court: Was the same point made there?

Mr. Strayer: The same point was made there. "It is [1017] well established that the purchaser of physical assets of a business may not be held to have assumed existing contract obligations to a Union in the absence of a showing of acceptance of such liability. Moreover, there is no contention that the contract for the disposition of the physical assets of the Juneau Lumber Mills, Inc., was not bona fide, or that there was any common identity between the purchaser and the seller. We find, therefore, that the Company did not assume the agreements to which Juneau Lumber Mills., Inc., was a party signatory, nor the contractual relations thereunder."

Mr. Andersen: I would like to mention that involved in the case, of course, obviously there is a change of custodian by the usual trustee in bankruptcy and supplementing the ownership of the corporation.

The Court: What case are you speaking of?

Mr. Andersen: The one Mr. Banfield referred to, your Honor, the Locomotive case.

The Court: The Court adheres to its prior ruling.

(Whereupon Court was recessed until two o'clock p.m. May 11, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

Mr. Andersen: The defense rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Banfield: One rebuttal witness. [1018]

PLAINTIFF'S REBUTTAL

ROBERT M. DRUXMAN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Banfield:

Q. Will you state your name, please?

A. Robert M. Druxman.

Q. Where do you live, Mr. Druxman?

A. Juneau.

Q. What was your occupation in 1948?

A. Newspaper reporter for the "Alaska Daily Empire."

Q. Did you have any interviews with Mr. Verne Albright during 1948?

A. On several occasions.

Q. At his or your request.

A. Usually at my request, though on a couple of occasions he did say he had something he thought might be of interest to me.

Q. Did Mr. Albright ever give you anything of particular interest to you?

A. Yes. On either July 5 or 6, 1948, he gave me a copy of a resolution passed by the Juneau C.I.O. Union Council.

(Testimony of Robert M. Druxman.)

Q. Did he make any request at that time, or did you?

A. Well, it is customary when a reporter receives something like that to be used as material in a newspaper story, and [1019] I asked him if he had any objection to my publishing it—he said "No." He handed it to me and said I could keep it.

Q. Did he hand it to you or did you ask for it?

A. I believe that——

Q. Unless you are quite certain, you don't need to answer.

A. On two occasions I was in his hotel room, one of them I met him on the street and the other time he phoned me up and asked me to come down there. I am not sure which it was, but the result was this resolution had been passed and he suggested I would be interested in seeing it.

Q. He suggested you would be interested in seeing it? A. That is right.

Q. And afterwards handed it to you?

A. That is right.

Q. I will hand you Exhibit 23 and ask you if that is the document he gave you at that time?

A. Yes, that is the document.

Q. Did he know you were going to publish it in the newspaper? A. Yes.

Mr. Andersen: I object to that as a conclusion of the witness.

The Court: If he knows——

A. Yes.

(Testimony of Robert M. Druxman.)

Q. And did you write an article about it? [1020]

A. Yes.

Cross-Examination

By Mr. Andersen:

Q. What was the date?

A. The article was published?

Q. Yes. A. July 6, 1948.

Q. As a newspaper reporter you are always seeking items of general interest to the public?

A. Yes.

Q. You heard about this resolution being passed from some source?

A. From Mr. Albright.

Q. It was of general interest and you wanted to publish it in your paper. He had one and you published it in your paper?

A. That is it, more or less.

Mr. Andersen: That is all. Thank you.

Mr. Banfield: We rest, your Honor.

(Witness excused.)

The Court: You may proceed with the opening argument.

Mr. Strayer: Your Honor, we will have some requested instructions to tender, and also we have a motion to make at [1021] this time.

The Court: In the absence of the jury, you mean?

Mr. Strayer: Yes, your Honor.

The Court: The jury may retire until called.

(Whereupon the jury retired from the courtroom.)

Mr. Strayer: It just occurred to me I might be premature in saying in the absence of the jury, a motion for a directed verdict in favor of the plaintiff in this case. Is that the practice, to do it in the absence or presence of the jury?

The Court: In the absence of the jury.

Mr. Strayer: Plaintiff moves the Court to direct the jury to return a verdict for plaintiff and against defendant in such amount of damages sustained by plaintiff as the result of the strike at the plant. I may say to the Court, Mr. Banfield and I are uncertain under Alaska procedure whether it is necessary to make this point in order to save a legal point we wish to save. The fact that uncontradicted the evidence has proven we are entitled to damages, the only uncertainty is the amount of damages, and that is the purpose of our motion at this time.

The Court: Do you wish to say anything?

Mr. Andersen: We think the record speaks for itself, your Honor.

Mr. Strayer: May I add one thing? We are specifically [1022] moving for a directed verdict as to each of the defendants.

The Court: Well, I think there are certain questions of facts, such as, for instance, the scope of the officers or agents, the scope of their employment, which must go to the jury. Call the jury.

Mr. Strayer: Is an exception necessary?

Mr. Banfield: The statute states yes. Under our

present rules I think that has been dispensed with.

The Court: I think on a decision of the Court on any matter of law, it is unnecessary to take an exception, but of course they often do.

Mr. Andersen: We proceeded on the same assumption, that it was not necessary.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: You may proceed.

(Whereupon, Norman Banfield, of attorneys for plaintiff, made the opening argument to the jury in behalf of the plaintiff and thereafter, George R. Andersen, of attorneys for defendants, made the opening argument to the jury in behalf of the defendants.)

(Thereupon, the jury was duly admonished and Court adjourned until ten o'clock a.m., May 12, 1949, reconvening as per adjournment, with all parties present as heretofore [1023] and the jury all present in the box.)

(Whereupon, Henry Roden, of attorneys for defendants, made the closing argument to the jury in behalf of the defendants; and thereafter, Manley B. Strayer, of attorneys for plaintiff, commenced the closing argument to the jury in behalf of the plaintiff.)

(Thereupon, the jury was duly admonished and Court recessed until two o'clock p.m., May 12, 1949, reconvening as per recess, with all

parties present as heretofore and the jury all present in the box; whereupon Manley B. Strayer, of attorneys for plaintiff, concluded the closing argument to the jury in behalf of the plantiff.)

(Thereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon respective counsel were furnishd copies of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury.)

The Court: Ladies and gentlemen of the jury, you may now retire until called.

(Whereupon, the jury retired from the courtroom.)

The Court: Do counsel wish to take exception? They may do so now.

Mr. Andersen: I think the record should show that counsel stipulated.

The Court: The record may show, if it doesn't already, [1024] that the jury is absent.

Mr. Andersen: And may it be stipulated that the exceptions may be made in the jury's absence?

Mr. Strayer: Yes.

Mr. Banfield: I am not sure now that in taking exceptions the reason must be stated.

The Court: Yes, you must state the reason.

Mr. Banfield: We wish to except to the Court's refusal to give plaintiff's instruction 3A, requested

by instruction 3A by the plaintiff, because we feel it would be prejudicial to plaintiff's case to not have that fact known to the jury.

The Court: I don't think it is the jury's concern. It is like punishment in a criminal case.

Mr. Banfield: And if the Court please, the definitions in plaintiff's requested instructions 4 and 5, and Court didn't give instruction 4.

The Court: That is not necessary. That is undisputed.

Mr. Banfield: We wish to except to the failure of the Court to give plaintiff's requested instruction No. 9, for the reason that we believe the jury should know what "ratification" means in order to fully determine the issues in this case.

The Court: But there is no evidence upon which an [1025] instruction of that kind could be predicated, and it would be an abstract instruction, as I see it. There was no evidence.

Mr. Strayer: I think there was circumstantial evidence of ratification. The newspaper article is the evidence that the International, for example, ratified the activities of Local 16 up here, or rather ratified the activities of Mr. Albright up here and, of course, with regard to the Local, if your Honor please, the fact that the picket line was maintained was ratification of the activities of the Local in making demand for the work.

The Court: So far as the article to which you refer, I doubt if that would sufficiently be ratification, but so far as the picket line is concerned,

ratification could perhaps be implied from that, but it is so notorious, it seems to me.

Mr. Andersen: I think the term "ratification" could only apply to the Local. So far as the International was concerned, the testimony was that the Local put them there.

Mr. Strayer: I think your Honor is correct on that.

Mr. Banfield: Plaintiff wishes to take exception to the Court's failure to give plaintiff's requested instruction No. 12, because particularly it contains the element of what constitutes a breach of duty, and the factor of attaching responsibility, regardless of whether he has knowledge of the act or not.

The Court: That is covered, and, of course——

Mr. Banfield: I haven't been able to find it.

The Court: And the Court should avoid repetition or emphasis on any point.

Mr. Strayer: Which instruction is that included in, your Honor?

The Court: It is the latter half of Instruction No. 6 that covers it.

Mr. Banfield: On page 9 or 10, your Honor?

The Court: Nine, the latter half.

Mr. Strayer: I think your Honor's Instruction No. 6 is predicated on theory that two parties have knowingly entered into a conspiracy to commit an unlawful act. What we wanted to raise in the requested instruction was that if the participant International entered into an agreement to commit a particular act to bring about a particular result,

and even though he did not know that the result is an unlawful one, nevertheless if there was any active participation by himself, then he is liable. It seems to us that is not covered by No. 6.

The Court: Well, do you think the evidence—that there is any basis in the evidence, or something like that?

Mr. Strayer: Of course, the International has taken the position all the way through that it had nothing to do with the strike, and did not have knowledge of the Local's doing or what was going on up here. It seems to me the newspaper [1027] article is some evidence that the International did know what was going on and steps were taken, although they might have thought that the strike was legal. Mr. Banfield points out that the same thing would apply to both the International and the Local, the fact they thought the strike was legal, even though they did something in active participation.

The Court: The whole tenor of the instructions is that the acts were not legal, so I don't see how it could become the instructions, assuming that the acts charged were illegal, and the further degree of participation by one of what he does is immaterial, so long as he does something. In other words, the old axiom that ignorance of the law is no excuse would apply.

Mr. Banfield: If the Court please, the plaintiff excepts to the failure of the Court to give the plaintiff's requested instruction No. 13, for the reason that

the defendant Local set up an affirmative defense which it has wholly failed to establish.

The Court: The Court has instructed that the whole defense was based or rested on their Exhibit C, which is out of the case, and the Court so instructs.

Mr. Banfield: I didn't have an opportunity to look these over in advance. I was unable to see that. It may be, if the Court is satisfied——

The Court: It is Instruction No. 11. [1028]

Mr. Strayer: No. 11 refers to the decision, your Honor.

The Court: And Exhibit C.

Mr. Strayer: All it does, your Honor, is instruct that Exhibit C was introduced for a limited purpose and it is not binding on the plaintiff. There is still no instruction that would prove affirmative defense.

The Court: It is taken out of the summary of the pleadings. I removed it.

Mr. Strayer: Is it the practice here, does your Honor send the pleadings to the jury?

The Court: Not in this case. The last instruction is to that effect, and only the instructions and the exhibits go in.

Mr. Strayer: I see.

Mr. Banfield: Now, the Court please, I think we will take exception to the failure of the Court to give plaintiff's requested instruction No. 16, which we think is very necessary in this case because of the amount of testimony which there has been and argument here with respect to the failure of the plaintiff to bargain collectively with Local 16, and under the

law it was under no obligation to do so whatsoever, and we think the Court should instruct the jury accordingly.

The Court: That is not an issue in this case and the Court shouldn't instruct on anything but what is in issue. [1029] We could get a lot of collateral issues that way.

Mr. Strayer: I am unfamiliar with the practice here. The practice I am used to is where there is failure to prove any element in the case or that came in which wasn't established or was argued to the jury, has no bearing. The custom is that those matters should not be considered. Now, it may be that that has been taken care of by limiting the instructions to the specific things mentioned, but as I say, I am a little unfamiliar with the practice and it is a little hard for me to reconcile. Your Honor feels by limiting the instructions to the issues you have thereby removed from the jury——

The Court: The instruction was No. 4.

Mr. Strayer: Then may we have an exception to the instruction No. 4, which was given for the reason that it is submitted as an issue of fact to the jury, whether or not it was established that the acts complained of were admitted by the various individuals as within their scope and employment. It is our feeling the evidence is undisputed and those facts were within the scope of the jury and should not have been established as an issue for the jury. That same remark would apply to Instruction No. 5, since it is made a question of fact whether acts performed were within the scope of the employment, Instruction 5,

page 8. I take exception to the word "and" instead of the word "or." [1030]

The Court: On what line?

Mr. Banfield: On line 8.

Mr. Strayer: Of Instruction No. 5.

The Court: Yes, I will change that to "or."

Mr. Andersen: Instruction 5?

Mr. Strayer: And on line 8, should be "or" instead of "and."

Mr. Strayer: Instruction No. 6 raises a problem, and perhaps the exception should come from the defendant rather than the plaintiff. The last paragraph submits to the jury whether or not in finding a verdict against either defendant or both defendants, and it has then, for myself and Mr. Banfield, that that particular act of unlawful activity was performed by Local 16 and to the effect the I.L.W.U. was involved only to the extent they aided and assisted Local 16 in its activities. If you assume Local 16 is not liable, it would seem to automatically follow that the International would not be liable. I don't think it is correct to find against the International and in favor of the Local.

Mr. Andersen: What instruction is that?

Mr. Strayer: Instruction No. 6. I think if another sentence were added that a verdict could not be returned against the International unless the Local was also found liable, that would be correct. That would also affect one of the forms of verdicts. [1031]

Mr. Banfield: The word "either" is what makes it improper, I believe, because under that alterna-

tive the jury could find the International liable and the Local not, and I feel the Court would either have to set the verdict aside or it could be argued by the defendants that if the Local—since the Local has been absolved, therefore the Court must absolve the International, so that, I believe, is clearly objectionable. It could be cured by the addition of the words "however, the International cannot be found liable unless you find the Local 16 liable."

The Court: I don't see it that way. I realize that a verdict of that kind would be inconsistent, but that is not the kind of inconsistency that would determine it. Verdicts of that kind are rather common where there is more than one defendant.

Mr. Strayer: The liability of the International, if it has any, is vicarious as the result of the activities of the Local, comparable to master and servant, where the master is charged as the result of the servant, and the jury might find a verdict against the master and not the servant.

The Court: That would appear, certainly, to be quite an objection if there was no evidence here of any acts by the International, then the relationship wouldn't be fatal, as I say, to a verdict against the parent organization.

Mr. Strayer: What your Honor has reference to is it [1032] would possible for the jury to find that the International had itself engaged in activities, induced people not to handle our products, but that the Local had not. That is possible, but contrary to the theory on which we tried the case, but it is a conceivable theory.

Mr. Andersen: So far as defendants are concerned, and each of them, may it please the Court, we wish to object first to the failure and refusal of the Court to give our instructions No. 1 through 14.

The Court: I think No. 14 was given.

Mr. Andersen: I beg your pardon?

The Court: Fourteen was given.

Mr. Andersen: Our objection with respect to No. 1, the failure of the Court to submit to the jury public policy in relation to this type of controversy in relation to the Taft-Hartley Act; with respect to our proposed Instruction No. 2, the objection is the same, mainly a failure of the Court to instruct regarding the public policy and also failure of the Court to instruct that the Taft-Hartley Act has territorial limitations and has no applicability in Canada. Also in relation to No. 2, that in so far as the public policy of the Act is concerned, in relation to argument the other day on an advised verdict, that the Juneau Spruce unreasonably refused to enter into negotiations. With respect to No. 3, our objection there is that it is at all times, as we understand the law [1033] under the Taft-Hartley Act, for an employer to bargain with any person claiming to represent employees as the Local 16 did here. The fact, of course, that they are not permanent employees, but may be intermittent employees, is an immaterial matter, and also with respect to the matters of carpenters and plumbers, etc., under the Taft-Hartley Act, those carpenters and plumbers,

etc., would have the right to bargain with the employer in the manner set forth in our instruction. With regard to Instruction No. 4—do you wish to comment or shall I continue?

The Court: I will break in.

Mr. Andersen: With respect to No. 4, we think from the facts of this case it was necessary to advise the jury that the Juneau Spruce Corporation could, with the consent of the I.W.A., have assigned the work to the Longshoremen, and that simply because an assignment may have been made means that such assignment is not irrevocable. With relation to No. 5, which relates to peaceful picketing and the rights to peaceful picketing under the laws of the United States, we object to the failure of the Court to give that instruction, particularly as it relates to peaceful picketing and relates to coercion, inducement or intimidation, and also of the failure of the Court to instruct as suggested in the final paragraph on the question of whether or not M-271, they themselves independent of Local 16 or the other defendant, eventually did [1034] what they agreed to do. With respect to Instruction 6 we object to the failure of the Court to instruct on that, as we think it embodies a very important rule, the law of agency. An agent cannot bind an agency by declaration.

The Court: I think it is in there, unless it has been overlooked because of the inability of the Reporter to be working on instructions and reporting arguments at the same time.

Mr. Andersen: With respect to requested instruction No. 7, we object to the failure of the Court to give that as it relates to the precise and definite manner in which damages must be proved. With respect to our Instruction 8, we object to the failure of the Court to do that, though the Court has ruled on that during the trial, as it relates to the intents of the contract even from one entity to another, that is based on 170 Federal, which was discussed the other day during the argument; in other words, being defendant's position that the contract did carry over and that Juneau Spruce was bound by its course of conduct by the contract that was then in effect on April 30 between Juneau Lumber and this Local, and of course also we object to the failure of the Court to instruct as set forth in the paragraph of Instruction 8, the bargain in good faith aspect of the instruction, and that is based on applicable provisions of the Taft-Hartley Act requiring employers to bargain at all times in good faith. With [1035] regard to Instruction 9 based upon 9(c)(1)(b) of the Act, and the Court failed to instruct on it, if there is a dispute between two groups or two representatives as to who should perform the work, then the employer has a right to petition the Board as set forth in those provisions. We think under the facts of this case that it is proper for that instruction to be given. With respect to No. 10, it is a different statement of the preceding instruction with regard to failure or refusal of the employer to petition the National Labor Relations

Board to have an investigation and immediate certification, and we take the position that a failure so to do under the section of the Taft-Hartley Act mentioned, is a matter which at least could be considered as a matter of mitigation of alleged claimed damages. We also object to the failure of the Court to give our requested Instruction No. 11, and of course the Court has also ruled on this question in the case in chief. That refers to the fact that contracts may be oral or written and may be—that contracts may be formed by custom and practice, customs in the particular trade or occupation, and of course give the jury an opportunity to find that a contract existed, and therefore, the contract existing, and due to the fact that it contained an arbitration clause, it would be a bar to recovery also. We object to the failure of the Court to give requested Instruction No. 12 on the grounds that the Court failed to instruct the jury on public policy of the United States [1036] as set forth in Section 201 of the Act, which is the section that enjoins both employees and employers to peaceably settle issues by conciliation, mediation or arbitration. We feel the failure of the Court to give that, particularly from the evidence that they refused and failed to negotiate, or even set down and talk, is prejudicial to the defendants' case. We object to the failure of the Court to give requested Instruction No. 13, which refers to Section 204 of the Taft-Hartley Act, again enjoining duties upon the employer which were not done and which we think

are material to the defendants' case. We object to the Court's not having given Instruction No. 14 and the words as presented. I had in mind the instruction the Court did give. I also want to object to that particular exhibit going into the jury room for two reasons: first, I think the stipulation during the course of the trial there was entered into with respect to that particular exhibit——

The Court: Was there such a stipulation?

Mr. Andersen: Yes, there was.

The Court: It seems to me that if that were so, no offer of that would have been made in evidence.

Mr. Andersen: Despite other stipulations?

The Court: You didn't object.

Mr. Andersen: Oh, yes, I did on many grounds.

Mr. Strayer: Yes, to the introduction. It was offered solely to prove [1037] lack of certification, but counsel never offered to stipulate there was a certification.

Mr. Andersen: I think the facts show neither were certified, and it was brought out in evidence.

The Court: I don't think there was any testimony to that either way.

Mr. Andersen: I may be in error, your Honor, I can't profess to accurately quote the record after two weeks of trial, but my best recollection is the record will show that was stipulated to between counsel, mainly that neither of the labor organizations involved, the I.L.W.U. as well as I.W.A., were certified. Of course, there could be collective bargaining without certifying. I object to it going to

the juryroom because it is not properly in evidence. That is why depositions are not permitted in evidence, because usually there are matters stricken.

The Court: I think the objection is well taken, but I think it should have been taken more timely, though it is not too late if the parties wish to stipulate that the Unions were not certified, and if it is stipulated it won't go in.

Mr. Strayer: I don't recall the stipulation.

The Court: I mean now.

The Strayer: We don't want our clients to be prejudiced in any way; if we feel that they will not be, we are willing to stipulate there was no certification [1038] and it will be withdrawn and not go to the jury.

Mr. Andersen: Mr. Paul states, and we never alleged we were certified——

Mr. Strayer: You denied our allegation.

Mr. Andersen: But denials and pleadings have no place in the juryroom. There is no evidence against it; therefore, as a matter of testimony it is undisputed. It is cumulative on that, but we are not objecting to evidence at this time.

The Court: But if you are willing to stipulate, I suggest calling the jury for the purpose of stipulating and the exhibit will be withdrawn.

Mr. Andersen: With respect to the instructions as given, did I say fourteen—I believe I did, your Honor—let's see, with respect to the Court's Instructions as given, with respect to Instruction No. 4, as propounded by the Court, we object to the

first paragraph on the grounds that it is too limited a definition of the common law rule of agency, and too narrowly defines the quantum of proof. We object to the third paragraph of the same instruction on the grounds that there is—that the instruction is again too narrow, and while there was testimony as to who Mr. Bulcke was and who Mr. Berry was and who Mr. Albright was, who are the only alleged International officers referred to by the plaintiff, the instruction again negatives the idea, or rather carries [1039] an insufficient amount of proof necessary to prove the agency. There is no proof in the record as to the authority of either Mr. Albright, Mr. Bulcke or Mr. Berry, in so far as the allegations of the complaint or proof are concerned, and therefore we feel this portion of the instruction is entirely too narrowly drawn and leaving out the question of any actual agency or authority that may have been conferred upon those particular people. We object to the final paragraph of page 4 on the ground that it doesn't state the law applicable to this case, and also to the further ground that in respect to time, may it please the Court, it isn't sufficiently limited. There could be no claim here so far as the International is concerned. The pleadings refer to April 10 as the date. It was true Mr. Bulcke was here six or seven months before that time and also true that Mr. Albright was here about four or five months before that time, that is, prior to the time of the complaint, and the remoteness of time in relation to Mr. Bulcke and

Mr. Albright, we feel in relation to the entire Instruction No. 4—it isn't limited to time.

The Court: It is limited by Instruction 5 as to time, and the Court can't repeat each point in each instruction.

Mr. Andersen: I understand that, your Honor. With respect to the last paragraph of Instruction 4 on page 7, we also object to that on the ground that the language is [1040] entirely too general and doesn't state the law of agency in relation to the facts of this case. Under the common law rule of agency I don't believe there is any rule that he should have known or by ordinary care a person should have known, what an agent may or may not have done. With respect to No. 6, we want to object to the language thereof, particularly in so far as it relates to a conspiracy. I don't believe under the pleadings any reference to a conspiracy is proper.

The Court: Well, it is dealt with from an evidentiary standpoint only, and of course it is pretty well settled that once the facts show or tend to show an agreement or a combination of that kind, the rules of evidence as to conspiracy apply even though not charged.

Mr. Andersen: We want to object on the further ground—I don't find the Court's reference to April 10—on the further ground in the instruction the Court did not limit it so far as the International to April 10, if they were damaged to that time, and the International wouldn't be liable. May 8 is the date

of Mr. Albright named he first mentioned subsequent to April 10. With respect to No. 11, Exhibit No. 20, Defendant's Exhibit No. C, I believe, we object to that instruction for the reasons previously stated.

Mr. Strayer: What was that?

Mr. Andersen: The Court's Instruction No. 11 on [1041] page 15—no, I think I am in error—no, Exhibit C there is the contract, I believe, that was in effect between Juneau Lumber Mill——

The Court: No, it is the contract between the Waterfront Employers and the I.L.W.U.

Mr. Andersen: And also, as Mr. Schmidt testified, between Local 16—it had Local 16 on its face——

The Court: The Juneau Lumber Mills name isn't anywhere on it.

Mr. Andersen: Local 16 is, and Mr. Schmidt testified Local 16's name is on it, and Mr. Schmidt testified that was the contract that had been in effect prior to May 1, and he testified they carried on under it. We object to the instruction upon the fact that it is a matter that should go to the jury and is fully and completely in evidence, admitted in evidence in relation to Mr. Flint's testimony, showing the contract and good faith on the part of the Longshoremen.

The Court: The position I have taken——

Mr. Andersen: I am making the objection for the record. I assume your Honor's position is the same. I think that concludes it, although it must

necessarily be a bit sketchy in the present scheme of things.

Mr. Strayer: Your Honor, may I add one exception on No. 11? We feel Exhibit C should not go to the jury for any purpose. It was offered under the promise that they [1042] would connect it and show a continuing contract and they did not. It had no relevancy, rebutting Mr. Flint. He said they never proved to him there was such a contract. I can't see what relevancy it has in the case under those circumstances.

Mr. Paul: May it please the Court, for the same reasons suggested by counsel in regard to the last paragraph in Instruction No. 6, we make the objection to the last paragraph in Instruction No. 6 and also to the form of Verdict No. 2.

The Court: You mean you think that they are either both guilty or neither?

Mr. Paul: No, no—that if the defendant Local is innocent it will be impossible for the International to be found guilty. Under the verdict they might assume the situation that the Local would be released, Verdict No. 2.

The Court: I understand. Is that all the objections there are?

Mr. Andersen: Yes, your Honor.

The Court: With reference to Exhibit C, my notes show that was introduced on the promise it would be connected up, and also show that it had been renewed. It expired by its date in 1942, and I do not recall any evidence of its renewal, and

hence I am inclined to agree with counsel for plaintiff that that also should not go to the jury.

Mr. Andersen: To which we also except, may it please [1043] the Court. The Court will recall the argument by the respective counsel on the point also. I think I noted an objection to not including C in the exhibits.

The Court: Yes, you have.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: Ladies and gentlemen of the jury, it has been stipulated by counsel that neither of the labor organizations, the defendants, is certified or has been certified, by the National Labor Relations Board and that makes it unnecessary——

Mr. Andersen: I thought that also referred to the I.W.A., all labor organizations.

The Court: I say, each defendant. I think that covered it.

Mr. Andersen: Also I.W.A., they weren't certified either.

The Court: I see, that is also the I.W.A. Not any of them is certified, and that makes it unnecessary to submit to you Plaintiff's Exhibit No. 20. There has been an instruction here about that exhibit and also Exhibit C, but neither of those exhibits will go to you.

(Whereupon the bailiffs were duly sworn to take charge of the jury.)

The Court: Ladies and gentlemen, perhaps I

should [1044] further inform you that they are not submitting a sealed verdict to you, that your verdict will be received at any time that you arrive at one. You may now retire to your jury room to consider your verdict.

(Whereupon the jury retired to the jury room at 4:45 o'clock p.m. in charge of the bailiffs, to deliberate upon a verdict.)

(Whereupon Court adjourned until 10:00 o'clock a.m., May 13, 1949, subject to call; reconvening at 9:05 a.m., May 13, 1949, with all parties present as heretofore and the jury all present in the box; whereupon the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I understand that you wish further instructions. Am I correct in that?

Mr. Foreman: Yes, sir, we do need further instructions.

The Court: Upon what points or questions?

Mr. Foreman: Primarily upon the basic duties of a juror and relevant and irrelevant points in the case, clarification of the issues at stake and the law governing them, and reiteration of the duties of a juror I think would help.

The Court: Well, the law precludes me from giving you any instructions orally. I will have to prepare the additional instruction on those points in writing and submit them [1045] to you in the same way that the remainder of the instructions

were given you. The Court will therefore be in recess as far as this case is concerned until called, and the jury may again retire.

(Whereupon the jury retired from the courtroom and Court recessed until called; reconvening at 11:35 o'clock a.m. May 13, 1949, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:)

The Court: Ladies and gentlemen of the jury, in response to your request, you are instructed as follows:

(Whereupon respective counsel were furnished copies of the Court's Supplementary Instructions to the Jury and the Court read his Supplementary Instructions to the Jury.)

The Court: Do the parties wish to take their exceptions in the absence of the jury?

Mr. Andersen: I assume Mr. Banfield will make the same stipulation?

Mr. Banfield: Yes.

The Court: The jury may now retire until called.

(Whereupon the jury retired from the courtroom.)

Mr. Andersen: We object, may it please the Court, to all of the instructions on one general ground with respect to all of them, that the instructions are the equivalent of a directed verdict for the plaintiff; that is, considered [1046] together. With

respect to specific instructions, we object to No. 1, the first paragraph, for the reason that it joins a commentary and the advisability of yielding to the demands or requests of the majority. The second paragraph we object to on the grounds that it is coercion of the jury in an effort to coerce a verdict in the case. With respect to Instruction No. 2, we wish to object to the first paragraph for the reason that the evidence shows only that the Longshoremen sought to negotiate with the plaintiff in the case, and there was a refusal to negotiate. This is an issue in the case, relating to the dispute. We wish to object on the further ground that there should have been a separation in the circumstances of the work done at the Alaska Steamship Dock here. This instruction throws all of the alleged claims of the plaintiff together.

We also wish to object to these instructions upon the general objection of extra-territoriality, to which we directed your Honor's attention before, also that it fails to consider the objections we made before about the necessity as required in the Act and particularly with respect to the public policy matter that we argued before, in that it negatives the public policy and doesn't take into consideration the public policy of the Act, particularly in relation to the unreasonable and arbitrary refusal of the plaintiff to bargain, which is an admitted fact in the evidence.

Also, we object in so far as it relates to the International, that the question of the quantum of evidence necessary to prove principal and agency in

order to hold the principal liable, is not adequately or properly set forth. The same objection we make to Instruction No. 3, that is with respect to the law applicable to proving principal and agent, and with respect to the word "ratification" in the instructions. We again call attention to 8(c) of the Act upon which an instruction was requested, and which should have been embodied in that instruction. The same objection that we make to No. 3 we make to No. 4. It over-simplifies the possibility of settling responsibility on the International, with respect to the absence of quantum of proof to prove agency. We object to the last portion of that instruction on page 5, which improperly sets forth—we do not understand that a principal may be held for acts of an agent when such acts have not either been specifically authorized or when particularly such acts have been forbidden, or are unlawful—particularly forbidden.

We also object to Instruction No. 5, that it is an over-simplification of the issues and a directed verdict on the part of the Court, and we think that the issues set forth in our instructions to which we incorporated these instructions, set forth and raise issues material to the defendants' case. We do not consider that the only issues are whether [1048] the things alleged here were done, although I think those objections were covered when we made our motion for an advised verdict at the close of the plaintiff's case, and we object to the refusal of the Court to give our Instruction No. 15—I believe is

the number—which was submitted with the Court's approval during the recess.

Mr. Strayer: If the Court please, with reference to Instruction No. 2, plaintiff would like an exception on the ground that it leaves as an issue for the jury whether plaintiff was damaged. We consider your Honor correctly stated the legal result, except we haven't considered it an issue by the jury, whether plaintiff did in fact suffer damage. We have shown, I think, that some damage did occur and are not agreed on what amount of damage, but I think it follows that plaintiff is entitled to damage for some amount.

With reference to defendant's exception to Instruction No. 4, the last paragraph, page 5, the use of the word "forbidden"—I think your Honor's instruction is a correct statement of the law; however, I have some doubt in my mind whether it would apply to this case. It may be abstract.

Mr. Andersen: What instruction?

Mr. Strayer: No. 4, the last paragraph, page 5—the language used there. I think the principle would be applicable where a negligent act was involved, but here the charge is aiding and assisting in an unlawful act. I doubt [1049] if that rule of law would come in. I rather think the word "forbidden" should be stricken from that instruction.

Mr. Banfield: "And forbidden."

The Court: As I recall that decision in the Colorado case, the Supreme Court held just that whether it is wanton, willful, reckless or forbidden—

it may be that it is abstract in the sense here, but, however, I think the instruction I gave yesterday submitted by you had the same qualification in it.

Mr. Strayer: I don't recall which instruction your Honor refers to. A Requested Instruction, do you mean, your Honor?

The Court: Yes. It was a short instruction. I think it was your instruction on the scope of employment.

Mr. Strayer: No, your Honor, there is no reference in that instruction.

Mr. Banfield: If your Honor please, you must be referring to Instruction 12, the last line, our requested Instruction No. 12 which was rejected, but the word "forbidden" I am quite sure we never used.

Mr. Andersen: I would like to add one further objection also, your Honor.

The Court: That part of the clause containing the word "forbidden" is stricken, and lines 20 and 21 of Instruction 2 are also stricken. You say you have another objection? [1050]

Mr. Andersen: Yes, I have, to Supplemental Instruction No. 1, may it please the Court. I think that should be amended in general to advise the jury that this instruction is not to be too literally construed, that it is the duty of each juror to make up his own individual mind and should not change his opinion regardless of the majority, unless and until he or she personally becomes convinced by virtue of all the evidence and circumstances of the case, that his or her opinion should be changed.

The Court: I think that is covered by Instruction No. 13 given yesterday.

Mr. Andersen: I don't have that before me, your Honor.

The Court: If that is all, we will call the jury in.

Mr. Strayer: May I get it straight on my copy, of Instruction 2? Our lines don't coincide. Could your Honor tell us the starting words?

The Court: The first two of the last three lines.

Mr. Strayer: And Instruction No. 4, the words stricken are "And forbidden by the principal or employer"? Is that correct?

The Court: Yes.

Mr. Andersen: What are you striking? What instruction? [1051]

Mr. Strayer: No. 4, page 5.

Mr. Andersen: Of the new instructions—what is stricken?

Mr. Strayer: "And forbidden by the principal or employer."

The Court: Call the jury.

(Whereupon the jury returned and all took their places in the jury box.)

The Court: Ladies and gentlemen of the jury, you may now retire for further deliberation.

Mr. Banfield: If the Court please, does the Court wish to call attention to the changes?

The Court: I have made them.

Mr. Banfield: As long as they know about them——

The Court: I made a few slight changes, ladies and gentlemen, in two instructions, by crossing some words out and you can see those for yourselves.

(Whereupon the jury retired from the courtroom and Court was recessed at 12:10 o'clock p.m., May 13, 1949.)

(Thereafter, Court having reconvened at 2:00 o'clock p.m., May 13, 1949, the plaintiff appearing by Norman Banfield and Manley B. Strayer, of its attorneys; the defendants appearing by William L. Paul, Jr., and George R. Andersen, of their attorneys and the jury being absent from the courtroom; and before adjournment the following occurred:) [1052]

The Court: By the way, before counsel in the case—before counsel leave the courtroom, I am inclined to allow the jury to return a sealed verdict if they don't agree by a certain time today or tonight. I overlooked the fact when I told them they could return a verdict any time that nobody at our house can hear the telephone unless they happen to be downstairs.

Mr. Andersen: Suppose they don't agree—that means they just stay? Only if they reach a verdict——

The Court: They can go home only if they reach a verdict.

Mr. Andersen: May I be permitted—when I was objecting to the Supplemental Instructions I don't know whether I gave the reason as to No. 15, our purported Instruction No. 15. The basis upon

which I object—it may be repetitious, your Honor—was that the Court failed and refused to give the instructions and failed to apprise the jury of those statements and declarations and arguments, etc., which under the section referred to they may make and do under the terms of the Act itself.

The Court: Well, I took the view that it was, rather the aspect was not connected there. As I see it, whatever declarations or statements were made are not so important. It is the acts that followed, the acts set forth in the complaint. I think I will call the jury in about 5:00 o'clock [1053] then for the purpose of instructing them with reference to a sealed verdict.

(Whereupon, Court was recessed.)

(Thereafter, Court reconvened at 4:15 o'clock p.m., May 13, 1949, with all parties present as heretofore with the exception of Mr. Roden, and the jury all present in the box; whereupon the following proceedings were had:)

The Court: Ladies and gentlemen, have you reached a verdict?

Mr. Foreman: We have, your Honor.

The Court: You may hand it to the Clerk. You may read and file the verdict.

Whereupon Verdict No. 1 was read by the Clerk, finding for the plaintiff and against both defendants and assessing plaintiff's damages in the sum of $750,000.00; and thereupon, at the request of counsel for the defendants, the jury was polled and

each member of the jury answered individually in the affirmative as to his concurrence in the verdict rendered, with no negative answer, whereupon the jury was excused and retired from the courtroom.

Mr. Andersen: I understand motions for new trials, according to your rules, are made in writing?

The Court: Yes.

Mr. Andersen: The time period is what—three days or ten days? [1054]

The Court: Well——

Mr. Banfield: Two days; two or three days.

The Court: I am confused as between criminal cases and civil cases—three days, within three days.

Mr. Andersen: Do you exclude the first day?

The Court: Yes, and holidays.

Mr. Banfield: What was that?

The Court: Three days.

Mr. Banfield: And if the Court please, I intend to be out of town for a few days. I expect to be back for the next motion day. I just want to tell Mr. Andersen.

Mr. Paul: If there is a motion made, it only has to be made within three days.

Mr. Banfield: Yes, but I thought Mr. Andersen might want to get away and he might want to make it and argue it.

Mr. Andersen: I guess it would go over until the usual motion day. I could check, but I assume the time for appeal only runs from and after the judgment?

The Court: The judgment.

Mr. Andersen: The judgment would be allowed after the termination of the motion?

The Court: Yes, that stays any action as far as judgment is concerned.

Mr. Banfield: We will take the motion up next Friday. [1055]

Mr. Andersen: Then there is no judgment entered now?

The Court: No.

(Whereupon Court was adjourned.)

(Thereafter, Court having convened at 10:00 o'clock a.m., May 20, 1949, the plaintiff appearing by Norman Banfield of its attorneys, and defendants appearing by William L. Paul, Jr., of their attorneys, the above-entitled cause came on for hearing on motions and the following occurred:)

Mr. Paul: I have informed counsel that the first two motions will be submitted, your Honor; however, I should like to have the opportunity of stating my position with regard to the motion for additional time.

The Court: Well, you may argue that in the regular order.

Mr. Banfield: Plaintiff is ready.

The Court: You say the first two motions you submit without argument?

Mr. Paul: Yes, your Honor.

The Court: The motions will be denied, therefore, and the third motion will be argued in the regular order.

Clerk of Court: Isn't that last one the one you submitted to the Court the other day and the Court denied?

Mr. Paul: The Court has given me permission to submit my authority. [1056]

Mr. Banfield: It would be all right to have a ruling on the motion for judgment notwithstanding the verdict, but the second is a motion for a new trial. If that is for a new trial, if it is denied, that third couldn't be argued. Mr. Paul, I think, means the motion may be denied for judgment notwithstanding the verdict and then argue the motion for additional time and the other one.

Mr. Paul: I don't think it is inconsistent.

The Court: I think the inconsistency is more apparent than real.

(Thereafter, and before adjournment, the above-entitled cause was called up for hearing on the motions and the following occurred:)

Mr. Paul: May it please the court, the motion and affidavit for additional time within which to file additional grounds and supporting affidavits, re motion for new trial, was filed at 4:45 last Monday, which I understand was the last day within which the usual three days allowed for the filing of the motion. It had been approximately one hour before that the main motion for new trial was filed. We conceived it advisable on the parts of the defendants to not include in the main motion any ground that the jury had been swayed by passion or preju-

dice, because we simply didn't have the information and didn't want to be put in a position of alleging the ground when we had at that time no basis, [1057] no suspicion that such a ground existed. At that time I understand the Court became aware of the motion for additional time and overruled the motion. I believe it was the next day I addressed myself to the Court, asking this opportunity to present authorities in support of the motion, and I think we indicated at that time that no further investigation would be made of any of the jurors by counsel for the defendants because of the nature of the public policy which the Court believed applicable here, that members of the jury should not be questioned.

As I have stated to the Court, I am most circumspect in my conduct and of the rulings of the Court not to infringe upon anything, or any possibility of infringing upon anything. I will be very brief.

To conclude, I have done nothing further in the investigation of individual jurors. Now, I understand from what the Court has said that there is in the Court's mind the public policy that the verdict of the jury should be given every encouragement to stand; that is to say, attorneys on the losing side are not permitted to quiz jurors, to ascertain if misconduct had occurred in deliberations of the jury. Now, I am unacquainted with such public policy and in my investigation of the authorities I can find I suggest——

The Court: Better not argue that point. I am

certain the public policy is to discourage parties or litigants [1058] from quizzing jurors as to the method by which they arrive at a verdict.

Mr. Paul: I principally make one citation to the Court. It is very close in point, to support my position. That appears in Volume 52 ALR on page 33.

The Court: What is the topic?

Mr. Paul: Quotient verdict. The citation I have given is in the annotation. The annotation begins at page 41 and is entitled Quotient Verdicts. The citation beginning at page 33 is the case of Benjamin vs. Helena Light and Railway Company, Montana Supreme Court, discussing the topic of quotient verdicts. I need only make reference to what the Court had before it, which appears on page 37. There affidavits were obtained from every single member, with the possible exception of one—every single member of the jury. That indicates the scope of the examination of the jury on both sides. The Court concludes what it feels is the general principle at the end of page 40, from which I gather it is the primary public policy that the jury shall obey the instructions of the Court and apparently everything that both sides had done in examining the jury after their deliberations and their discharge, in getting all these affidavits, that there was nothing wrong connected with it in view of the primary public policy that the jury follow the instructions of the Court [1059]

Mr. Banfield: If the Court please, Mr. Paul has failed to state what he intends to show by these

affidavits, and I think that is quite material in this case. He states in his motion that he believes they acted with passion and prejudice and now gives a citation with reference to a quotient verdict. He seems to be flitting from one ground to another. I would like to call the attention of the Court to the fact there was a poll of the jury in this case. The rule stated in 64 Corpus Juris 1062 is, and this is under the subject of inquiry as to the grounds of verdict, that "If the poll of the jury is conducted by counsel, a juror cannot be interrogated as to the grounds of his assent or dissent." If he is talking about a quotient verdict, that would be very applicable, and the poll of the jury was made by the defendants.

In 64 Corpus Juris page 1108 it is stated—this is under the heading "Evidence Affecting Verdict—a. Affidavits and Testimony of Jurors to Sustain, Impeach, or Explain. Jurors will not be heard to impeach a verdict duly rendered by them and recorded, and their affidavits introduced for such purpose will be disregarded. Thus jurors cannot impeach their verdict by affidavits or testimony that the verdict was the result of misapprehension, or mistake of fact, or was arrived at by lot, or by averaging estimates, or to disclose the incompetency or misconduct of their fellow jurors, or to show what improper [1060] methods they employed to arrive at the verdict." This is directly in point on the quotient verdict. "Or what items were allowed or disallowed in computing the amount of the ver-

dict, or that they did not understand the effect of their verdict, or that, had the juror known of certain evidence, he would not have rendered the same verdict, or that improper matters were considered by the jury." Now, affidavits can be used under these circumstances. "But affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake does not embody the true finding of the jury, or to correct an erroneous statement of the verdict to the court or entry by its clerk, or to remove an ambiguity, or, where a sealed verdict is returned without specifying the amount of the recovery, to show what they intended to be understood as their verdict. Jurors are competent witnesses for the proof of extraneous facts which may have influenced their conduct, as, for example, coercion on the part of the bailiff, or matters which took place outside the court, but what took place while the jury were kept in the custody of the officer of the court for the purpose of deliberation is not matter outside of court. Affidavits or evidence of jurors are admissible when made in support of or to explain a verdict, as, for instance, by showing whether interest was computed on plaintiff's claim." And that is the law. The rule is that the Court can refuse [1061] to even summon the jurors, but certainly for counsel to go out and secure jurors for the purpose here, is absolutely out of order and cannot be done under any circumstances, but if there is reason to believe there is a mistake, then the jurors can be summoned, but not for invading the privacy of the jury.

We ask at this time that the motion be denied and the motion for a new trial be denied, and judgment entered, and the papers are prepared.

Mr. Paul: May it please the Court, in preparing my argument here I got about every citation and I refer to 46 ALR, page 1509, in which the editors express their concern for a statement which appeared in RCL. It is very much like counsel read to the Court from Corpus Juris.

The Court: Here is the view I take of the motion: it is predicated on the possibility of obtaining something which there has been a week to obtain, and there is no showing made that it has been obtained. It seems to me all the motion sets forth is speculation; that is, the motion is made for the purpose of obtaining an opportunity to question the jurors in the hope that will be found. It has been a week since the verdict. I don't see how I can consider it. It doesn't present ground, it presents hopes, and that isn't sufficient to move the Court with. These items are beside the point. When you speak of a quotient verdict—I haven't [1062] looked into it. It might upset it, but there is nothing here to show that there was.

Mr. Paul: As the affidavit indicates, I had commenced my investigation, your Honor, and I will be frank to state to the Court I had been able to talk to one juror by the time the Court overruled the motion, but because I might be presuming on the prerogatives by continuing the investigation as an officer of the Court, I withheld; otherwise, I think

I would have been able to present affidavits this morning. I felt from the one there was reasonable grounds for continuing the investigation and not hopes.

The Court: I am not speaking of what is in your mind, but I can only consider what is in this motion. Even though there may be some ground for questioning the jurors, it seems to me three days is sufficient time to obtain something definite. The Court is confronted with a motion, not speculation.

Mr. Paul: The three days included Saturday and Sunday, and it was almost impossible to do anything during those times, so I concluded the investigation with one juror, and spent the rest of the time writing up the motion for new trial and about four thirty in the afternoon realized I wouldn't have time, so I filed the additional motion we are now discussing. As I say, I may have been too cautious in following this procedure. I didn't want to do anything wrong [1063] in so far as this Court is concerned by examining jurors. My information Tuesday morning was that the Court overruled my motion. In the face of that it seemed useless and would be bordering on contempt. I didn't care to undertake that responsibility.

The Court: I had no idea this was the same motion I denied several days ago. I thought it was another motion, but as I say, it certainly lacks the specification of any definite ground upon which the Court can act. The motion is denied.

Mr. Banfield: If the Court please, I have the

orders here prepared. I have the form of the judgment prepared in this case.

Mr. Paul: Well, I am going to object to any consideration, your Honor, except upon notice.

Mr. Banfield: I want to present it to the Court at this time, one reason is to have the attorneys' fees set by the Court. The complaint requested attorneys' fees of $10,000.00 in this case, and plaintiff's costs and disbursements.

The Court: Do you have any objection?

Mr. Paul: It is the first time I have seen it, and I would like to have an opportunity of getting in touch with Mr. Andersen.

The Court: You wish to have time to file objections? [1064]

Mr. Paul: It was just put in front of me.

Mr. Banfield: It is a matter of right as an ex-party matter. Two days are allowed after entry to take exception. The judgment can be entered by the Court. It is not necessary that approval of judgment be given by the adverse party, and we don't want this judgment to lay here until next June 6 when the Court returns. There is nothing to a judgment of this kind, it can be examined in one minute.

The Court: Except in the practice here, the practice has been to give the opposing side an opportunity to examine it and determine whether they want to object and to have the objections heard.

Mr. Paul: Do I understand your Honor that there will be even no motion day next Friday?

The Court: No, there is not going to be any motion day. Well, it seems to me that the form of the judgment here is so short that you could determine whether you want to object to it and if so, state the grounds of your objection.

Mr. Paul: My point, your Honor, is, following the usual practice, I don't have the final say. It is true I am the attorney of record, but Mr. Andersen is still in the case and I am duty-bound to consult with him.

The Court: Well, Mr. Andersen isn't here.

Mr. Paul: He isn't here, he is in San Francisco. I certainly could do that by next Friday and get an answer back, [1065] too.

The Court: Well, you mean no ground of objection occurs to you, but you think Mr. Andersen might have some?

Mr. Paul: I haven't even looked at it.

The Court: Well, the Court won't pass on it at this minute.

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. Juneau Spruce Corporation, a corporation, vs. International Longshoremen's & Warehousemen's Union, an unincorporated association, and International Longshore-

men's & Warehousemen's Union, Local 16, an unincorporated association, No. 5996A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and caused the same to be reduced to typewriting;

That the foregoing pages numbered 1 to 1066, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 1st day of March, 1950.

/s/ MILDRED K. MAYNARD,

Official Court Reporter, U. S. District Court, First Division, Territory of Alaska.

[Endorsed]: Filed April 11, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Alaska, Division No. 1—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 212 pages of typewritten matter, numbered from 1 to 212, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the

record prepared in accordance with the Praecipe, Supplemental Praecipe, Suplemental Counter Praecipe and Supplemental Praecipe of the Appellant on file herein and made a part hereof, in Cause # 5996-A, wherein the International Longshoremen's and Warehousemen's Union, an unincorporated association, is Defendant-Appellant and Juneau Spruce Corporation, a corporation, is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of an appeal and Citation issued in this cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Sixty Nine Dollars and 75/100 has been paid to me by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 20th day of April, 1950.

/s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 12527. United States Court of Appeals for the Ninth Circuit. International Longshoremen's and Warehousemen's Union and International Longshoremen's and Warehousemen's Union, Local 16, Appellants, vs. Juneau Spruce Corporation, a Corporation, Appellee. Transcript of Record. Appeal from the District Court of the Territory of Alaska, Division Number One.

Filed April 24, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12527

JUNEAU SPRUCE CORPORATION,

Plaintiff-Appellee,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16, an Unincorporated Association,

Defendants-Appellants.

AFFIDAVIT OF GEORGE R. ANDERSEN

State of California,
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants-appellants in the above-entitled matter. That on or about the 9th day of June, 1949, the Judge of the District Court for the Territory of Alaska, Division No. 1, made and entered his order allowing an appeal, fixing a cost bond, and setting time for the settlement of a bill of exceptions in the above-entitled matter which is on appeal from the said District Court for the Territory of Alaska to the above-entitled Court.

On or about the 9th day of June, 1949, a stipulation was entered into by and between the attorneys for the defendants-appellants and the attorneys for the plaintiff-appellee in this matter and approved by the Court, a true and correct copy of which stipulation is attached hereto and incorporated herein by this reference and marked Exhibit A.

That said stipulation provides, among other things, that the defendants-appellants' statement of points on appeal and the designation of record, including a transcript of testimony, may await thirty days after filing of the transcript of testimony with the Clerk of the District Court for the Territory of Alaska, Division No. 1, by the reporter of the said Court. Such a stipulation was made necessary because of the fact that it is impossible for defendants-appellants to properly prepare their designation of record on appeal and their statement of points on appeal until the said transcript is filed as aforesaid.

The Court below has approved this stipulation and your affiant prays that this Court also approve this stipulation.

/s/ GEORGE R. ANDERSEN.

Subscribed and sworn to before me this 15th day of June, 1949.

[Seal] /s/ PEARL STOCKWELL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

EXHIBIT A

In the District Court for the Territory of Alaska, Division Number One, at Juneau

No. 5986-A

JUNEAU SPRUCE CORPORATION,
Plaintiff-Appellee,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16, an Unincorporated Association,
Defendants-Appellants.

STIPULATION

It is hereby stipulated between counsel for the respective parties in the above-entitled cause that

the defendants' statement of points on appeal and the designation of the record including transcript of testimony may await 30 days after the filing of the transcript of testimony with the Clerk of this Court by the Court Reporter.

It is further stipulated that in printing the record herein that the title of the court and cause in full on all papers may be omitted except on the first page of said record, and that there shall be inserted in place of said titles on all papers used as a part of said records the words "Title of Court and Cause." Also that all endorsements on said papers used as a part of said record shall be omitted except the Clerk's file marks and the admission of service.

Done at Juneau, Alaska, this June 9, 1949.

/s/ WM. J. PAUL, JW
Of Attorneys for Appellants.

/s/ NORMAN BANFIELD,
Of Attorneys for Appellee.

Good cause appearing herein, it is So Ordered. June 9, 1949.

/s/ GEORGE W. FOLTA,
Judge.

In the United States Court of Appeals
for the Ninth Circuit

JUNEAU SPRUCE CORPORATION,
Plaintiff-Appellee,

vs.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16, an Unincorporated Association,
Defendants-Appellants.

ORDER

Upon the reading and filing of the affidavit of George R. Andersen, Esq., and good cause therefor appearing,

It Is Hereby Ordered that the stipulation entered into by and between counsel for the plaintiff-appellee and counsel for the defendants-appellants on June 9, 1949, and approved by the Judge of the District Court for the Territory of Alaska, Division No. 1, in the above-entitled cause which bears No. 5986-A in the records of the said Court be, and the same is hereby, approved.

Dated: June 16, 1949.

/s/ WILLIAM HEALY,
Judge of the U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed June 16, 1949.

At a Stated Term, to wit: The October Term 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the seventeenth day of January in the year of our Lord one thousand nine hundred and fifty.

Present: William Healy, Circuit Judge, Presiding;
Honorable Homer T. Bone, Circuit Judge;
Honorable William E. Orr, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND DOCKET CAUSE

Upon consideration of the motion of appellants for an extension of time to file the transcript of record herein, and docket above cause in this court, and good cause therefor appearing, It Is Ordered that the time within which the certified transcript of record may be filed and cause docketed in this court be, and hereby is extended to and including sixty days from the filing of the transcript of testimony with the District Court for the Territory of Alaska, and that the time within which said transcript of testimony may be filed in said District Court of Alaska is extended to March 10, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO PERFECT APPEAL AND FILE TRANSCRIPT

Come now the defendants in the above-entitled matter and move the above-entitled Court for its order permitting defendants to have until 60 days after the filing of the transcript of the testimony with the Clerk of the United States District Court for the District of Alaska within which to perfect their said appeal and to file herein all necessary documents in support thereof.

This motion is based upon the Affidavit of George R. Andersen attached hereto.

Dated: August 20, 1949.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

/s/ GEORGE R. ANDERSEN,
Attorneys for
Defendants-Appellants.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF GEORGE R. ANDERSEN IN SUPPORT OF MOTION FOR EXTENSION OF TIME WITHIN WHICH TO PERFECT APPEAL AND FILE TRANSCRIPT

State of California,
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says:

That he is of counsel for defendants-appellants in the above-entitled cause. That said cause was tried before the United States District Court in and for the Territory of Alaska at Juneau, Alaska; that on June 9, 1949, the Notice of Appeal and Order Allowing Appeal to the United States Court of Appeals for the Ninth Circuit were filed in the office of the Clerk of said United States District Court.

That by rule of the said District Court in Alaska and the statutes thereunto appertaining, said Court has authority to allow only 90 days from the time of filing of notice of appeal within which to settle the bill of exceptions under the practice of that Court; that on June 9, 1949, said District Court granted appellants herein 90 days from June 9, 1949, within which to settle the bill of exceptions herein.

That in order to settle the bill of exceptions, it is necessary to have the transcript of testimony taken at the trial, and by virtue of the great volume of business conducted by said United States District

Court in Alaska, affiant has been advised by the reporter of said Court that it will be at least six months from said June 9, 1949, before said transcript of testimony has been completed.

That in order to protect the time and rights of appellants herein, it is necessary that the above-entitled Court, to which jurisdiction has been transferred by said appeal, grant an extension of time to 60 days after the filing of said transcript of testimony in said United States District Court, within which said defendants-appellants may perfect their appeal in this Court.

That in this case counsel for the respective parties have agreed that in lieu of the bill of exceptions, the transcript itself may be filed and the appeal taken in consonance with the new Federal Rules of Procedure applicable to United States District Courts and Circuit Courts of Appeal.

/s/ GEORGE R. ANDERSEN.

Subscribed and sworn to before me this 20th day of August, 1949.

[Seal] /s/ PEARL STOCKWELL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

[Title of Court of Appeals and Cause.]

ORDER

Upon considering the motion of defendants-appellants herein, supported by the Affidavit George R. Andersen, Esq., and good cause appearing therefor:

It Is Hereby Ordered that said defendants-appellants may have to and including 60 days from the filing of the transcript of testimony in the United States District Court for the Territory of Alaska within which to perfect their appeal herein by docketing said transcript of testimony, together with all other necessary papers in support of said appeal; and it is further Ordered that the time within which the transcript of testimony may be filed in the United States District Court for the Territory of Alaska is extended to January 10, 1950.

Dated: Aug. 25, 1949.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

Judges of the U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed August 29, 1949.

At a Stated Term, to wit: The October Term, 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the tenth day of March in the year of our Lord one thousand nine hundred and fifty.

Present: Honorable Clifton Mathews, Circuit Judge, Presiding;

Honorable Homer T. Bone, Circuit Judge;

Honorable William C. Mathes, District Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND DOCKET CAUSE

Upon consideration of the motion of appellants for an extension of time to file the transcript of record herein, and docket above cause in this court, and good cause therefor appearing, It Is Ordered that the time within which the reporter's transcript of testimony may be filed in the District Court for the Territory of Alaska, and the certified transcript of record filed and cause docketed in this court be, and hereby is extended to and including May 10, 1950.

[Title of District Court and Cause.]

STIPULATION AS TO RULES

It is hereby stipulated and agreed by and between counsel for the respective parties in this cause that the appeal, preparation of briefs and the form of appeal may be had in accordance with the Rules of Civil Procedure for the District Courts of the United States which have become applicable to Alaska since the judgment of the District Court was entered herein.

Juneau, Alaska, March 8, 1950.

/s/ WILLIAM L. PAUL, JR.,
Of Counsel for Appellants.

/s/ N. C. BANFIELD,
Of Counsel for Appellee.

[Title of Court of Appeals and Cause.]

MOTION FOR ORDER PERMITTING APPEAL IN COMPLIANCE WITH NEW RULES OF FEDERAL CIVIL PROCEDURE

Come now the defendants in the above-entitled cause and move the above-entitled Court for its order permitting the above appeal to be taken and had pursuant to the new Rules of Federal Civil Procedure presently in effect and governing appeals from District Courts of the United States, including

the Territories, to the Court of Appeals for the Ninth Circuit.

This motion is made upon the affidavit of George R. Andersen attached hereto.

Dated: March 21, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

By /s/ G. R. ANDERSEN,
Counsel for
Defendants-Appellants.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

U. S. Circuit Judges.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF GEORGE R. ANDERSEN

State of California,
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says:

That he is one of the attorneys for defendants-appellants named above. That the above-entitled cause was tried before the United States District Court for the Territory of Alaska and judgment therein entered in May, 1948, at a time prior to

the time when the new Rules of Federal Procedure were applicable to said Territory.

That since said time said new Rules of Federal Procedure, by Act of Congress, have been made applicable to the said Territory of Alaska. That the parties hereto, through their respective counsel, have entered into a stipulation, the original of which is filed with the United States District Court for the Territory of Alaska at Juneau, Alaska, and a copy of which is annexed hereto.

That pursuant to said stipulation, defendants request the above-entitled Court to approve said stipulation and permit said appeal to be taken in accordance with said new Rules.

/s/ G. R. ANDERSEN.

Subscribed and sworn to before me this 21st day of March, 1950.

[Seal] /s/ AGNES QUAVE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

[Endorsed]: Filed April 6, 1950.

[Title of Court of Appeals and Cause.]

APPELLANTS' STATEMENT OF POINTS ON APPEAL

To the Honorable William E. Denman and Associate Justices of the United States Circuit Court of Appeals, for the Ninth Circuit:

Come now the appellants herein and respectfully state that the points upon which they intend to rely on appeal are each and every of those points set forth in defendants-appellants' assignments of error filed with the United States District Court for the Territory of Alaska, at Juneau, being part of the record filed in the above-entitled Court, pursuant to Rule 19(6) of the above-entitled Court.

Dated: April 29, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

WILLIAM L. PAUL, JR.,

By /s/ GEORGE R. ANDERSEN,

Attorneys for
Defendants-Appellants.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF THE RECORD ON APPEAL

Come now the defendants and appellants in the above-entitled cause and, pursuant to Rule 19(6) of this Court, designate the following as the record to be printed on appeal:

1. The entire reporter's transcript of all testimony;
2. The instructions given by the Court;
3. The instructions requested by the defendants-appellants and refused by the Court;
4. The entire Clerk's transcript;
5. With respect to all exhibits, subject to the approval of the above-entitled Court, defendants and appellants pray that said original exhibits be not printed, but that they may be referred to by the parties hereto and considered by the Court as though incorporated in the printed record.

Dated: April 29, 1950.

GLADSTEIN, ANDERSEN, RESNER & SAWYER.

WILLIAM L. PAUL, JR.,

By /s/ G. R. ANDERSEN,
Attorneys for
Defendants-Appellants.

[Endorsed]: Filed May 1, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR PERMISSION TO NOT PRINT EXHIBITS FILED IN THE ABOVE CAUSE

Come now the defendants and appellants in the above-entitled cause, through George R. Andersen, of counsel, and respectfully request the above-entitled Court to grant its permission to permit all of the exhibits herein to be not included in the printed record, but that said exhibits may be considered, and be referred to, by the Court and counsel as though contained in the printed record on appeal.

This motion is supported by the affidavit of George R. Andersen attached hereto.

Dated: April 29, 1950.

GLADSTEIN, ANDERSEN,
RESNER & SAWYER.

WILLIAM L. PAUL, JR.,

By /s/ GEORGE R. ANDERSEN,
Attorneys for
Defendants-Appellants.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF GEORGE R. ANDERSEN, OF COUNSEL, IN SUPPORT OF MOTION FOR PERMISSION TO EXCLUDE EXHIBITS FROM THE PRINTED RECORD ON APPEAL AND PERMITTING COURT AND COUNSEL TO REVIEW THE SAME

State of California,
City and County of San Francisco—ss.

George R. Andersen, being first duly sworn, deposes and says:

That he is counsel for the defendants and appellants herein.

That there are many and bulky printed and written exhibits in the above-entitled cause, including lengthy contracts, printed by-laws and constitutions of trade unions, newspapers and other bulky documents; that a great deal of the relevant portion of said exhibits has been read into the record of this cause and will be printed in the record on appeal; that in the opinion of counsel the proper and expeditious handling of this cause on appeal would best be subserved by not printing said exhibits as part of the record on appeal, but by permitting said exhibits to be considered and referred to by the Court and the parties hereto as though they were actually printed and incorporated in the record on appeal.

Wherefore, defendants and appellants pray that

said Court grant its permission to permit all of the exhibits in the said cause to be deemed a part of the printed record herein and that they may be referred to by the Court and counsel as though printed in said printed record.

/s/ GEORGE R. ANDERSEN.

Subscribed and sworn to before me this 29th day of April, 1950.

[Seal] /s/ AGNES QUAVE,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

/s/ WALTER L. POPE,

United States Circuit Judges.

[Endorsed]: Filed May 11, 1950.

No. 12527

Docketed

United States
Court of Appeals
for the Ninth Circuit.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the District Court for the Territory of Alaska Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12527

United States
Court of Appeals
for the Ninth Circuit.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

In the District Court for the Territory of Alaska, Division Number One, at Juneau

No. 5996-A

JUNEAU SPRUCE CORPORATION, a Corporation,

Plaintiff,

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, an Unincorporated Association, and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 16, an Unincorporated Association,

Defendants.

COURT'S SUPPLEMENTARY INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury, it is your duty to come to an agreement if you can conscientiously do so. If a large number or majority of the jury is of a certain opinion, the dissenting jurors should carefully consider whether their doubts or differences are reasonable. In most cases absolute certainty cannot be attained and, hence, the minority should listen with a disposition to be convinced to the arguments of the majority.

The plaintiff, defendants and Court have performed their respective duties. Justice to both the

plaintiff and the defendants requires that if possible there be no disagreement necessitating a retrial with all the attendant expense and delay.

You are particularly cautioned against allowing yourselves to be influenced by prejudice or anything other than the evidence and the instructions. Your attention is again directed to Instruction Nos. 1, 12 and 13 in regard to your duties.

No. 2

The issues in this case are simple and few. You are instructed that it is uncontradicted that the members of Local 16 engaged in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that this was for the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned.

The only issues, therefore, which remain for your consideration are whether damages proximately resulted from such concerted refusal and whether the International engaged in this concerted refusal to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff. Whether it did so engage depends on what its officers and agents did. If you find that the International, acting through its officers and agents, induced Local 16 or any other of its Locals to en-

gage in such concerted refusal, the International would be equally liable.

No. 3

With reference to the liability of Local 16 and the International for the acts of its agents and whether their agents acted within the scope of their employment, you are further instructed that, if you find from a preponderance of the evidence that the agents of the defendants decided that the defendants, or either of them, should engage in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that thereafter Local 16 and International became engaged in such a refusal, this would constitute a ratification of the acts of their agents, and it would then be unnecessary to determine whether such acts of their agents were within the scope of their employment. In other words, labor organizations are liable not only for the acts of their officers or agents done within the scope of their authority or employment but also for the acts done outside of the scope of their authority and employment which they thereafter ratify.

Ratification takes place where the principal, with full knowledge of the acts of the officer or agent, approves or adopts such acts or accepts the benefits thereof.

In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts

of its officers and agents and, hence, there is no issue for you to decide as to Local 16.

No. 4

In determining the scope of employment of the officers and agents of International you should consider all the evidence, oral and documentary, in order to ascertain the power and authority of International and its relationship to its Locals, and particularly whether it counsels, advises, intercedes on behalf of, or acts for its Locals or is obligated under its constitution to do so in labor disputes, whether its Locals or the International itself makes the decision to call a strike or engage in a concerted refusal such as the kind here dealt with, and whether thereafter the International calls or is empowered to call upon its Locals to join in such strike or concerted refusal to work, as well as all the other facts and circumstances in the case.

Upon determining the power and authority of the International in such matters, you will then be in a position to determine the scope of employment and authority of its officers and agents. Ordinarily the question whether a certain act is within the scope of employment of an agent of a labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. Here the acts alleged are not of that kind. In determining the scope of authority and employment of officers and

agents of International you may consider whether their acts were related to the power and authority of International, the character of such employment, the nature of the act or acts alleged, particularly with reference to whether such act or acts are such as are usually done in labor disputes, and whether the act or acts were for the benefit or in the prosecution of the business of the International, remembering however that an act may be unlawful and still be within the scope of the employment or authority of the agent.

[Endorsed]: Filed District Court, Territory of Alaska, 1st Division, May 13, 1949.

[Endorsed]: No. 12527. United States Court of Appeals for the Ninth Circuit. International Longshoremen's & Warehousemen's Union, Appellant, vs. Juneau Spruce Corporation, a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed July 29, 1950.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Division No. 1, at Juneau (hereinafter referred to as the "trial court") entered on May 20, 1949, upon a jury verdict, in favor of appellee and against both appellants in the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), together with appellee's costs and disbursements including an attorney's fee of Ten Thousand Dollars ($10,000.00). (T.R. 73-74.)

Appellee's cause of action was based on alleged unlawful activities by appellants arising out of an al-

leged jurisdictional dispute. Jurisdiction in the court below was alleged to exist under the provisions of Sec. 303 of the Labor-Management Relations Act, 1947, commonly known as the Taft-Hartley Act, 61 Stat. 158, 29 U.S.C. Supp. (1949), Sec. 187 (Second Amended Complaint, I, T.R. 2).[1] (Appendix, p. i.) By special appearance and motion to quash service of summons, appellant International Longshoremen's and Warehousemen's Union (hereinafter referred to as the "International") challenged the jurisdiction of the trial court over its person, and the purported service of summons upon it. (T.R. 7.) A demurrer of appellant International and appellant International Longshoremen's and Warehousemen's Union, Local 16 (hereinafter referred to as "Local 16"), challenged the jurisdiction of the trial court over the subject matter of the action, as well as over their respective persons. (T.R. 15.)

The trial court denied the motion and overruled the demurrer (T.R. 14), thus asserting its jurisdiction over both the subject matter of the cause and the persons of the appellants under the aforementioned section of the Act. Its accompanying opinion in support of these orders held that it was a District Court

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[1]The Labor-Management Relations Act, 1947, consisted of five titles. Title I contained the National Labor Relations Act, as amended; Title III was captioned, "Suits by and against Labor Organizations" and contained the provisions referred to in appellee's complaint. Throughout this brief the Labor-Management Relations Act, 1947, will be referred to as the "Act", and the National Labor Relations Act will be referred to as the "Labor Relations Act". The National Labor Relations Board, established by the National Labor Relations Act, will be referred to here as the "Board".

of the United States within the meaning of Sec. 303 of the Act, and, by implication, that this conclusion was determinative of the questions of jurisdiction. 83 F. Supp. 224 (1949). The cause proceeded to trial on April 22, 1949 (T.R. 109), and was submitted to the jury on the afternoon of May 12, 1949. (T.R. 1057.) On the following morning the jury requested and was given supplementary instructions. (T.R. 1057.) It returned its verdict that afternoon. (T.R. 1065.) Appellants' motions for a new trial and for judgment notwithstanding the verdict were denied by the trial court on May 20, 1949 (T.R. 70, 71), and the judgment from which this appeal is taken was entered that day. (T.R. 73-74.)

Jurisdiction of this court over the appeal is conferred by 28 U.S.C. Secs. 1291 and 1294(2). (Appendix, pp. ii-iii.)

STATEMENT OF THE CASE.

A. The Pleadings.

Appellee's second amended complaint (hereinafter referred to as the "complaint") can be briefly summarized as follows:

In addition to the jurisdictional allegation already adverted to, it stated the business of appellee to be that of lumber manufacturing (Complaint, V, T.R. 3-4), and identified the appellants International and Local 16 as labor organizations, the latter chartered by and affiliated with the former. (Complaint, III and IV, T.R. 3.) While Local 16's headquarters were

placed at Juneau, Alaska (Complaint, IV, T.R. 3), *the location of the headquarters or principal office of the International was omitted,* the complaint merely alleging that the International engaged in activities on behalf of its members in West Coast ports of the United States, in British Columbia, Dominion of Canada, and in the Territory of Alaska. (Complaint, III and IV, T.R. 3.)[2] Appellee's lumber manufacturing operations were alleged to include logging operations at Edna Bay, Alaska, milling, retailing and shipping functions at Juneau, Alaska, as well as retailing at Anchorage and Fairbanks, Alaska. (Complaint, V, T.R. 3-4.) The loading and unloading of barges at its mill in Juneau was declared to be an essential part of appellee's manufacturing and sales operations. (Complaint, V, T.R. 4.)

The majority of appellee's sales, it was averred, was made to customers in the United States (Complaint, V, T.R. 3-4), thus implying that appellee was engaged in interstate commerce within the meaning of the Act.

On this appeal, appellants concede that the foregoing allegations of the complaint were either proved upon the trial by appellee or established by stipulation of the parties.

The remaining allegations of the complaint assert its gravamen. It was alleged that following April 10, 1948, and until the date of the complaint, the appel-

[2]Evidence at the trial established that the International's principal office was in San Francisco, California (T.R. 273) and that it had no office or place of business in Alaska. (Pl. Exh. 19, par. 5; T.R. 12.)

lants induced and encouraged appellee's employees at Juneau, Alaska, and the employees of other employers, to engage in a concerted refusal to perform services for appellee, or to handle or work on goods of appellee (Complaint, VII, T.R. 5), an object of such activities being "to force and require [appellee] to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons, including members of Local M-271, to whom said work [had theretofore] been assigned" (Complaint, VIII, T.R. 5-6.) The International Woodworkers of America, Local M-271 (hereinafter referred to as "Local M-271") was alleged to be a labor organization which represented all of appellee's employees at its mill and retail yard in Juneau, with immaterial exceptions, and which had been recognized and bargained with as such representative by appellee during the period following April 10, 1948. (Complaint, VI, T.R. 4-5.) It was further averred that for the same period a collective bargaining agreement in effect between appellee and Local M-271 recognized the latter's right to bargain for the employees in question. (Complaint, VI, T.R. 4-5.) It was also alleged that neither appellant had been certified by the National Labor Relations Board as the bargaining representative for employees performing the work of loading appellee's barges (Complaint, VIII, T.R. 6); but it was not alleged that Local M-271 had been so certified.[3]

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[3]Evidence at the trial showed that it had not been. (T.R. 1051, 1056.)

It was contended that the picketing and coercive statements of appellants following April 10, 1948, and the communication of the fact of such picketing to other labor organizations in the United States and Canada, caused appellee's employees at its mill in Juneau to refuse to work from April 10, 1948, to July 19, 1948, and forced appellee to close its mill for that period. When sufficient employees returned to work to permit the mill to be reopened on July 19, it was further claimed that appellants' activities prevented shipments of lumber to appellee's customers, again forcing closing of the mill on October 11, 1948. Finally, it was contended that the direct and proximate result of these activities of appellants caused damage to appellee in the sum of one million, twenty-five thousand dollars ($1,025,000.00). (Complaint, IX, T.R. 6-7.) Attorneys' fees of ten thousand dollars ($10,000.00) as well as the stated sum in damages were sought. (Complaint, X, T.R. 7.)

These allegations of the complaint were controverted by the appellants' answers. (T.R. 23-24, 29-31.) In addition, Local 16 pleaded as an affirmative defense the existence of a collective bargaining agreement between itself and the Waterfront Employers Association of Juneau, Alaska, to which the appellee was a party, and under the terms of which appellee had agreed and was required to assign to members of Local 16 the work of loading its barges with lumber. Under said agreement, it was claimed, members of Local 16 were employees of appellee. (Answer and Affirmative Defense, 15-17, T.R. 25-26.) Local 16, it

was alleged, had peacefully picketed the mill of the appellee on and after April 10, 1948, with the full knowledge, acquiescence and consent of Local M-271, in order to require the appellee to abide by said collective bargaining agreement. (Answer and Affirmative Defense, 18-19, T.R. 27.) The appellee denied the substance of these allegations of Local 16's affirmative defense. (Reply, V through VIII, T.R. 32-33.)

B. The facts.

The summary of the facts which follows is by no means exhaustive, but simply furnishes background for the Court's consideration of the questions raised on this appeal. To the extent that the argument concerning and the discussion of particular errors require further reference to the evidence, it will be made when appropriate.

The competency of particular evidence concerning the necessity for the appellee to close its mill for the second time on October 11, 1948, was challenged on the trial by appellants, and the admission of such evidence is included among the appellants' Specification of Errors. Certain of the evidence at the trial was conflicting, but since the verdict of the jury was in favor of appellee, all such conflicts are resolved in favor of appellee in the following summary. From conflicting evidence viewed in such a manner, from evidence the competence of which is not disputed by appellants,[4] and from uncontradicted evidence at the

[4]With the exception of testimony concerning the reasons for the suspension of appellee's operations on October 11, 1948, which is discussed below.

trial, the jury was warranted in finding the following facts to be true:

The appellee came into existence as a corporation and began its lumber manufacturing operations in the spring of 1947, when it acquired the business of Juneau Lumber Mills, Inc. The method of transfer did not take the form of a purchase of the corporate stock of the predecessor. Instead, by contract with Juneau Lumber Mills, Inc., the appellee purchased a sawmill and planing mill at Juneau, Alaska, logging equipment at Edna Bay, Alaska, retail yards at Juneau, Anchorage and Fairbanks, Alaska, together with all equipment used in those operations. None of the old company's accounts were assumed or acquired. (T.R. 113-118.) Shortly before the transfer date of May 1, 1947, notices had been posted advising the mill employees in Juneau that Juneau Lumber Mills, Inc., was to cease operations as of the close of business on April 30, 1947, and that persons desiring employment with appellee should apply the following day. (T.R. 121, 123.) All mill employees of the predecessor company did so apply and were hired. The operations of the appellee began on May 2, 1947, with the mill employees consisting of those formerly employed by Juneau Lumber Mills, Inc. (T.R. 123, 228.)

At the time of the take-over, the appellee's predecessor was a party to a collective bargaining agreement with Local 16 whereby it had agreed to hire, and was hiring, longshoremen represented by that labor organization to perform all longshore work in connection with its operations. (Def. Exh. C; T.R.

918-919.) In practice, the work performed under that contract consisted of the loading of lumber aboard the tugs or boats of purchasers at the company's docks in Juneau. (T.R. 170-171, 232.) For this work the longshoremen were paid by the appellee's predecessor. Lumber which was shipped by commercial steamer was also loaded aboard ship by longshoremen represented by Local 16, who in those instances were employed directly by the steamship companies. (T.R. 155.)

These kinds of shipment accounted for but a small proportion of the predecessor's production at the time of the take-over, the greater proportion of production at that time going to the United States Army Engineers, which used its own personnel to pick up its lumber at the company dock. (T.R. 154-155, 183.) Until September, 1947, the situation with respect to the disposition of production remained the same for appellee as it had for its predecessor. Appellee continued to use longshoremen for the work covered under its predecessor's contract with Local 16 (T.R. 174-175, 933); the bulk of its production continued to go to the Army Engineers.

In September, 1947, appellee's contract with the Army Engineers was cancelled. (T.R. 183.) In anticipation of this, and of the necessity for it to dispose of most of its lumber elsewhere, the appellee had leased sea-going barges, to be used in shipping the bulk of its lumber to the United States. (T.R. 187.) That portion which the appellee had theretofore been shipping to the United States had gone by commercial

steamer (T.R. 157), following the practice of appellee's predecessor, which had never employed its own sea-going barges for that purpose. (T.R. 982.)

In October, 1947, instead of using longshoremen for the work, the appellee employed its own mill employees to place the first load of lumber on this sea-going barge. (T.R. 185-187.) These employees had never before loaded lumber aboard sea-going craft for shipment to the United States. (T.R. 982.) Immediately after the barge was loaded (T.R. 185), a committee of Local 16 visited the appellee, to request that the longshoremen it represented be given the barge-loading work. (T.R. 188.) The appellee rejected this request. (T.R. 189.) A second barge was loaded in the same manner in March, 1948. (T.R. 202.) Promptly thereafter a delegation from Local 16 appeared before a membership meeting of Local M-271 and explained to those in attendance its position that longshoremen, rather than the mill employees whom Local M-271 represented, were entitled to perform the work of loading the sea-going barges. (T.R. 832-836.) After the longshoremen's delegation had left, the Local M-271 meeting voted unanimously as follows:

> "Motion moved and seconded to go on record to not load barges. We figure this work belongs to the longshoremen." (Def. Exh. A; T.R. 838-839.)

Within the following week, a delegation consisting of representatives of Local M-271 and Local 16 informed Eugene S. Hawkins, Vice-President and General Manager of appellee, that Local M-271 had agreed that the work of loading the barges belonged to the

longshoremen. Hawkins was further informed that the members of Local M-271 would honor the picket line which Local 16 intended to place before appellee's mill if the latter persisted in its refusal to permit longshoremen represented by Local 16 to perform the work of loading the barges. (T.R. 203-206.) Even though the company's cost of operations would not have been materially affected by acceding to the joint request of the two locals (T.R. 252-253, 256-257, 266), and the appellee had earlier informed the longshoremen that it would accept such an agreement between them (T.R. 182), the appellee insisted that the work be done by Local M-271. (T.R. 261.)

A day or two later, on April 9, 1948, Local M-271 called a meeting which was attended by the overwhelming majority of the mill employees (T.R. 383, 404, 840), again to discuss the question of the longshoremen's right to perform the barge loading work and Local M-271's position with respect to the impending picket line. The minutes of the previous meeting recognizing the longshoremen's right to perform the work were read and approved and a general discussion ensued. (T.R. 841.) Those in attendance resolved unanimously to honor Local 16's picket line if it was established. The official minutes of the meeting read as follows:

> "Special meeting, April 9, 1948. Discussion on Conditions Relative to ILWU loading barges. Move made and seconded to take vote on whether to cross picket line—again a unanimous vote to honor picket line of ILWU." (Def. Exh. A, T.R. 842.)

The following morning Local 16 established its picket line at the appellee's mill, and the mill employees honored it in accordance with their resolution passed the previous evening. (T.R. 843.)

From April 10 to July 19, 1948, appellee's mill was closed. (T.R. 310.) During that entire period the appellee refused to negotiate with the unions concerning a settlement of the dispute on terms agreeable to both unions. (T.R. 781, 891, 991, 1027.) On the contrary, it insisted that Local M-271 perform the work of barge-loading, although that organization continued to maintain that the longshoremen represented by Local 16 were entitled to the work. (T.R. 323-325.) In May (T.R. 453), appellee telephoned from its office in Portland to the President of Local M-271 and asked him to come to that city to see the officers and counsel for his International union. Appellee paid the expenses of the trip. (T.R. 534-535.) After the return of its President from Portland, Local M-271 entered into an agreement with appellee in which that Local agreed:

> "* * * to cross the picket line established by Local 16, ILWU, and claim jurisdiction of all work performed by employees of the Juneau Spruce Corporation according to our contract, also the loading of company-owned or leased barges with company-owned gear * * *" (Pl. Exh. 7.)

This agreement represented the first claim by Local M-271 to the work in dispute and was followed by the immediate resumption of operations. (T.R. 439.)

Thereafter, another barge was loaded with lumber by mill employees and was shipped from the mill at Juneau to Prince Rupert, British Columbia, on August 27, 1948. The longshoremen at that port refused to unload the barge because of the existence of the dispute between Local 16 and the appellee. (Pl. Exh. 12; T.R. 619.) The barge was rerouted to Tacoma, Washington, where it was unloaded. (T.R. 687, 788.)

On October 11, 1948, the manufacturing operations at the mill ceased again. The reason advanced in testimony at the trial was that there was no more room for the storage of lumber on appellee's dock. (T.R. 696.) The appellee, it was contended, had been unable to have its lumber unloaded at any port in the United States, causing the over-taxing of its storage capacity in Juneau.[5] (T.R. 692-695.) Following the cessation of manufacturing operations at that time, extensive repairs and improvements were undertaken throughout appellee's operations in Juneau. (T.R. 696-697.) The picketing by Local 16 continued until the commencement of the action, at which time appellee's manufacturing operations had still not been resumed. (T.R. 413.)

C. Discussion of the questions involved.

1(a). The appellants contend that the failure of the complaint to allege that the National Labor Relations Board had made its decision and determination of the jurisdictional dispute out of which the cause of

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[5]The error committed by the trial court in admitting hearsay evidence concerning this alleged inability to unload in the United States is discussed among appellants' Specification of Errors. (See page 29, *infra.*)

action allegedly arose deprived the trial court of jurisdiction of the subject matter of the cause. The basis for this contention of the appellants lies in the interrelationship between Secs. 8(b)(4)(D) and 10 (k) of the Labor Relations Act and Sec. 303(a)(4) of the Act, and will be fully discussed in argument.

If the trial court lacked jurisdiction of the subject matter of the cause of action for this reason, the judgment must, of course, be reversed as to both appellants. The appellants raised this question by their demurrer. (T.R. 15.)[6]

1(b). Related to the question of the trial court's lack of jurisdiction over the subject matter of the action is the failure of the complaint to state a cause of action against appellants. The foregoing basis upon which the appellants contend the court below lacked jurisdiction may also result in a holding that the complaint was lacking in an essential element. It will thus be shown that even if it be considered that the court below had jurisdiction over the subject matter of the action, the failure to plead a prior determination of the Board made appellee's cause of action fatally defective.

The failure of the complaint to state a cause of action was raised by appellants' motion for judgment notwithstanding the verdict. (T.R. 67.)[7]

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[6]They are entitled in any case to raise this question on appeal here. *Mitchell v. Maurer,* 293 U.S. 237 (1934); *Southern Pacific Co. v. McAdoo,* 82 F.2d 121 (9 Cir., 1936).

[7]This question is also reviewable on appeal in any case. *Slacum v. Pomeroy,* 6 Cranch. 221 (1810); *U.S. Fidelity etc. Co. v. Whittaker,* 8 F.2d 455 (9 Cir., 1925).

2. Appellant International by its special appearance on motion to quash service of summons raised the question of the jurisdiction of the trial court over its person. (T.R. 7.)[8] The trial court, conceiving itself to be a District Court of the United States, denied the motion to quash, and held that since the International allegedly had an agent in the territory, it was subject to its jurisdiction although it maintained no office or place of business therein.[9]

3 and 4. In addition to these questions, appellants advance a number of others which require a reversal of the judgment below. These fall into two categories: (1) errors in the instructions of the court; (2) errors in the admission and exclusion of evidence. The rulings of the trial court in both categories were challenged at the trial by appropriate objections, which are specifically enumerated in the Specification of Errors (*infra,* pp. 16-33).

QUESTIONS INVOLVED.

1. Does jurisdiction vest in any court to entertain an action for damages pursuant to the provisions of Secs. 303(a)(4) and 303(b) of the Act prior to a determination of dispute made by the National Labor

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[8]Such lack of jurisdiction may be asserted upon appeal. *Endrezze v. Dorr Co.*, 97 F.2d 46 (9 Cir., 1938); *Alford v. Addressograph etc.*, 3 F.R.D. 295 (D.C. Calif., 1944).

[9]This holding was based upon the misconception that the provisions of § 301 of the Act were here applicable. We will demonstrate below that they were not. This same misconception resulted in an erroneous holding that service upon the alleged agent was service upon the International.

Relations Board pursuant to Sec. 10(k) of the Labor Relations Act, or, in the alternative, is such a prior determination by the Board an essential element of a cause of action under said provisions?

2. Is the District Court for the Territory of Alaska a District Court of the United States within the meaning of Sec. 303(b) of the Act?

3. Did the trial court err in its instructions to the jury?

4. Did the trial court err in admitting and excluding certain evidence at the trial?

SPECIFICATION OF ERRORS.

1. The trial court erred in holding that it had jurisdiction of the subject matter of the action, or, in the alternative, that the complaint stated a cause of action.

2. The trial court erred in holding that it was a District Court of the United States within the meaning of Sec. 303(b) of the Act, and thus in holding that it had jurisdiction of the person of appellant International, that appellant had been properly served and that the provisions of Sec. 301 of the Act generally were applicable.

3. The trial court erred in its instructions to the jury as follows:

(a) In giving Instruction No. 4:

"The Taft-Hartley Act further provides that any labor organization shall be bound by the acts of

its agents and that, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the acts done were actually authorized or subsequently ratified shall not be controlling.

"Since a labor organization can act only through its officers and agents, it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who, by the authority of his principal, transacts his principal's business or some part thereof and represents him in dealing with third persons.

"It is undisputed that Germain Bulcke, John Barry and the witness Verne Albright were, during the time covered by this controversy, officers of International. Hence, they were agents. But it is for you to say whether what they did, if anything, in committing or assisting in the commission of the acts charged, or any of them, if you find that such acts were committed, was within the scope of their employment.

"A person acts within the scope of his employment when he is engaged in doing for his employer either the acts consciously and specifically directed or any act which is fairly and reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work. If, in doing such an act, a person acts wrongfully, the wrongful act is nevertheless within the scope of his employment.

"The scope of employment is to be determined not only by what the principal actually knew of the acts of his agent within his employment but also by what in the exercise of ordinary care and

prudence he should have known the agent was doing." (T.R. 49-50.)

Appellants' demurrer raised the issue of whether the trial court was a District Court of the United States and whether the provisions of Sec. 301 of the Act applied to the case. This instruction, based upon Sec. 301, followed the erroneous determination of the trial court on these points.

(b) In giving Instructions Nos. 6 and 7:

"6. If you find from a preponderance of the evidence that during the period stated the defendants, acting separately or jointly, engaged in or induced or encouraged plaintiff's employees at Juneau, Alaska, to engage in, a concerted refusal in the course of their employment to manufacture, process, transport or otherwise handle or work on any lumber, or to perform any services for the plaintiff, and that the object thereof was to force or require the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom such work had been assigned, and that such acts directly and proximately caused pecuniary loss to the plaintiff, your verdict should be for the plaintiff in such amount as you find it has been damaged, not exceeding in any event the amount sued for. On the other hand, if you do not so find, your verdict should be for the defendants.

"In this connection you are instructed that, if you find from a preponderance of the evidence that the defendants, through their officers or agents acting within the scope of their employment, entered into a conspiracy or understanding to commit the aforesaid acts or any of them for

the object or purpose stated, or acted jointly or in pursuance of a common purpose or design, then from the time of entering into such a conspiracy or understanding everything that was done, said or written by any of the officers or agents of either in furtherance of such conspiracy or understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the defendants just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.

"A conspiracy, common purpose or design may be proved by direct evidence or by proof of such circumstances as naturally tend to prove it and which are sufficient in themselves to satisfy an ordinary prudent person of the existence thereof. Therefore, it is not necessary that such a combination or understanding be shown to be in writing. It is sufficient if the evidence shows a combination of or cooperation between two or more persons to accomplish a common purpose.

"On the other hand, if you find that the defendants did not act in concert or in pursuance of a common purpose or design, you will consider the case against each defendant separately, and you may find either or both or neither of them liable." (T.R. 51-53.)

"7. You are instructed that two or more persons or organizations may participate in a wrong although they do so in different ways, at different

times and in unequal proportions. One may plan and the other may be the actual instrument in accomplishing the mischief, but the legal blame will rest upon both as joint actors. Accordingly, one who directs, advises, encourages, procures, instigates, promotes, aids or abets a wrongful act by another is as responsible therefor as the one who commits the act, so as to impose liability upon such person to the same extent as if he had performed the act himself." (T.R. 53.)

Appellants objected to said instructions on the ground that it was erroneous to charge the jury concerning a conspiracy, where none was alleged in the pleadings (T.R. 1053), and on the further ground that the instructions permitted a finding against the appellant International alone, whereas the entire theory of the appellee was that the International could be held only if Local 16 were liable. (T.R. 1055, 1044-45.)

(c) In giving Instruction No. 11:

"You are instructed that plaintiff's Exhibit No. 20, consisting of a certified copy of the determination of the National Labor Relations Board in the controversy out of which this action arises, can be considered by you only for the purpose of showing that no union has been certified at plaintiff's plant, and that defendants' Exhibit C, introduced for a limited purpose, is not binding on the plaintiff and may not be so considered."

Appellants objected to said instruction on the ground that it improperly limited the jury's consideration of appellants' Exhibit C (i.e., the contract

between Local 16 and the Waterfront Employers of Juneau, to which appellee's predecessor was a party), and removed from the jury the material issue of fact whether a contract existed between appellee and Local 16.

(d) In giving Supplementary Instruction No. 2:

> "The issues in this case are simple and few. You are instructed that it is uncontradicted that the members of Local 16 engaged in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that this was for the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned.
>
> "The only issues, therefore, which remain for your consideration are whether damages proximately resulted from such concerted refusal and whether the International engaged in this concerted refusal to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff. Whether it did so engage depends on what its officers and agents did. If you find that the International, acting through its officers and agents, induced Local 16 or any other of its Locals to engage in such concerted refusal, the International would be equally liable." (T.R. 1100-1101.)

Appellants objected to said instruction on the ground that it directed a verdict against Local 16 on the matter of the liability of the Local and removed

from the jury all questions concerning the liability of Local 16 other than the question of damages, and on the further ground that the initial instructions concerning the necessity for establishing the separate liability of each appellant for damages, if any existed, were nullified by said instruction. (T.R. 1059.)

(e) In giving Supplementary Instruction No. 3:

"With reference to the liability of Local 16 and the International for the acts of its agents and whether their agents acted within the scope of their employment, you are further instructed that, if you find from a preponderance of the evidence that the agents of the defendants decided that the defendants, or either of them, should engage in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any service for plaintiff and that thereafter Local 16 and International became engaged in such a refusal, this would constitute a ratification of the acts of their agents, and it would then be unnecessary to determine whether such acts of their agents were within the scope of their employment. In other words, labor organizations are liable not only for the acts of their officers or agents done within the scope of their authority or employment but also for the acts done outside of the scope of their authority and employment which they thereafter ratify.

"Ratification takes place where the principal, with full knowledge of the acts of the officer or agent, approves or adopts such acts or accepts the benefits thereof.

"In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

Appellants objected to said instruction on the ground that it improperly stated the law of agency, and on the further ground that it in effect removed from the jury even the question of whether Local 16's conduct proximately caused damage to the appellee. (T.R. 1060.)

(f) In giving Supplementary Instruction No. 4:

"In determining the scope of employment of the officers and agents of International you should consider all the evidence, oral and documentary, in order to ascertain the power and authority of International and its relationship to its Locals, and particularly whether it counsels, advises, intercedes on behalf of, or acts for its Locals or is obligated under its constitution to do so in labor disputes, whether its Locals of the International itself makes the decision to call a strike or engage in a concerted refusal such as the kind here dealt with, and whether thereafter the International calls or is empowered to call upon its Locals to join in such strike or concerted refusal to work, as well as all the other facts and circumstances in the case.

"Upon determining the power and authority of the International in such matters, you will then be in a position to determine the scope of employment and authority of its officers and agents. Ordinarily the question whether a certain act is

within the scope of employment of an agent of a labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. Here the acts alleged are not of that kind. In determining the scope of authority and employment of officers and agents of International you may consider whether their acts were related to the power and authority of International, the character of such employment, the nature of the act or acts alleged, particularly with reference to whether such act or acts are such as are usually done in labor disputes, and whether the act or acts were for the benefit or in the prosecution of the business of the International, remembering however that an act may be unlawful and still be within the scope of the employment or authority of the agent." (T.R. 1102-1103.)

Appellants objected to said instruction on the ground that it likewise misstated the law of agency. (T.R. 1060.)

(g) In refusing to give appellants' requested Instructions Nos. 1 and 2:

"1. You are instructed that it is the public policy of the United States that—

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and

above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

"It is the purpose and policy of the Labor Management Relations Act of 1947, oftentimes called the 'Taft-Hartley Act', in order to promote the full flow of commerce, to prescribe legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (T.R. 34-35.)

"2. The Taft-Hartley Act was enacted in the interest of public policy to avoid economic strife and warfare, and so if you find from a consideration of all the evidence in this case that the action of the Juneau Spruce Corporation in refusing to accede to the demand of IWA M-271 to turn over the loading of barges to Local 16 was unreasonable or unjustifiable, in view of that provision, plaintiff is not entitled to recover any damage it may have sustained on account of such unreasonable or unjustifiable refusal to bargain.

"This policy is applicable only to the territorial limits of the United States and not to Canada." (T.R. 35-36.)

Appellants objected to the failure of the court to give said instructions on the ground that such instructions stated the public policy of the Act which it was appropriate for the jury to consider as bearing upon a defense to the action or in mitigation of damages. (T.R. 1046.)

(h) In refusing to give appellants' requested Instruction No. 11:

> "Labor contracts may be oral or in writing, or partly oral and partly in writing. They may be made through formal negotiations between the parties or be adopting the provisions of another contract existing between the same or other parties, or by adopting the customs and practices in a trade or industry which have been acquiesced in over a period of time.
>
> "If you find from a consideration of the evidence in this case that an agreement existed between Local 16 and the Juneau Lumber Mills, under which Local 16 performed all longshore work needed by Juneau Lumber Mills and that the plaintiff in this case adopted such agreement and hired members of Local 16 to do its longshore work, it may be fairly concluded that plaintiff adopted the contract formerly existing between Juneau Lumber Mills and Local 16 and it is bound by that adoption, and is required to carry out the terms thereof in good faith.
>
> "A labor contract, whether it be in writing or oral, or partly in one and partly in the other, should be construed in the light of all the facts and circumstances affecting the subject matter with which it deals. And you are authorized in arriving at a decision in this case to consider all

evidence introduced relating to the manner in which the parties themselves interpreted the provisions of that contract or agreement." (T.R. 41-42.)

Appellants objected to the court's refusal to give said instruction on the ground that it removed from the jury the question of whether or not a contract existed between appellee and Local 16. (T.R. 1049.)

(i) In refusing to give appellants' requested Instructions Nos. 12 and 13:

"12. You are instructed that section 201 of the Taft-Hartley Act provides as follows:

"That it is the policy of the United States that:

" '(a) Sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of the employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

" '(b) The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or

by such methods as may be provided for in any applicable agreement for settlement of disputes; and

" '(c) Certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreement provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.' " (T.R. 43-44.)

"13. Section 204 of the Taft-Hartley Act provides as follows:

" '(a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall:

" '(1) Exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provisions for adequate notice of any proposed change in the terms of such agreement;

" '(2) Whenever a dispute arises over the terms or application of a collective bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously;

> "'(3) In case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this act for the purpose of aiding in a settlement of the dispute.'" (T.R. 44.)

Appellants objected to the court's refusal to give said instructions on the ground that said refusal removed from the consideration of the jury matters which were material to appellants' defenses. (T.R. 1049-1050.)

(j) In refusing to give appellants' requested instruction concerning Sec. 8(c) of the Labor Relations Act, which reads as follows:

> "(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Appellants objected to the court's refusal to give said instruction on the ground that the agency principles upon which liability is predicated in an action of the character involved in this case would be otherwise too broadly stated. (T.R. 1060.)

4. The trial court erred in its rulings on evidence as follows:

(a) In admitting hearsay testimony concerning the ability of appellee to unload its lumber at various ports in the United States and Canada. The testimony admitted and the objections made to its admission appear in the record as follows:

"Q. Mr. Schmidt—Mr. Schultz, I am sorry—did you make any investigation or cause any to be made for you regarding the possibility of shipping through other ports in British Columbia?

A. No.

Q. Now, I am talking about at all times since you took over as Manager down there, you took over—at all times since you took over the Juneau Spruce Corporation's operations and management, did you attempt to ship to any other places on Puget Sound than Tacoma?

A. We investigated other places, but we didn't try to ship to other places.

Q. What areas did your investigation cover?

A. Port Townsend and Anacortes and Seattle.

Q. Just those three places?

A. And Tacoma.

Q. And Tacoma. And what was the result of that investigation?

A. That——

Mr. Andersen. I am going to object to this as calling for a conclusion and opinion of the witness, may it please the Court.

The Court. If he knows he may answer.

A. The ports of Tacoma and Seattle were found to be the only ones we would have with proper facilities down in Puget Sound for disposing of the products.

Q. And were they open to you—Seattle and Tacoma?

A. No.

Q. Now, did you actually try shipping any to Seattle?

A. Yes.

Q. Were you successful in getting it unloaded?

A. No.

Q. Do you know why?

Mr. Andersen. The same objection, your Honor.

The Court. Objection overruled.

Q. Do you know why?

A. Yes.

Q. What was the reason?

A. The tugboat captain was told not to pull into the dock.

Mr. Andersen. I object to that as hearsay.

Q. What was the reason.

A. He was not allowed to dock.

Mr. Andersen. May it please the Court, I move the previous answer be stricken.

The Court. Yes, that part of the previous answer based on conversation will be stricken.

Mr. Banfield. Will the Reporter repeat the last question and the last answer?

Court Reporter. Q. 'What was the reason?' A. 'He was not allowed to dock.'

Q. Who did you have make this investigation for you?

A. Mr. Harris.

Q. Who is Mr. Harris?

Mr. Andersen. May it please the Court, I move all this witness' testimony be stricken. It turns out that somebody else made the investigation for him. Obviously it is hearsay.

Mr. Banfield. We are entitled to show what agents of the company——

The Court. This question is competent. The objection is overruled as to this question. We will see what develops.

Q. Who was Mr. Harris?

A. An employee of the State Steamship Company.

Q. Doing this on your behalf?

A. Yes, sir.

Q. At your instructions?

A. Yes, sir.

Q. Did anyone else make any investigation for you?

A. Mr. Rogers.

Q. Who is Mr. Rogers?

A. He is our Portland attorney.

Q. Was there anyone else engaged in this investigation?

A. I was down there myself one trip.

Q. And was the result of all these investigations the same?

A. All the same.

Q. Did Mr. Winston Jones make an investigation?

A. Yes.

Q. Who is Winston Jones?

A. He is the District Manager of the State Steamship Company in Seattle.

Q. Is he the same Winston Jones that formerly was with the Alaska Transportation Company?

A. That is right.

Q. Did Mr. Jones and Mr. Harris make any investigation in Canada?

A. Mr. Harris did.

Q. When was that?

A. That was the time that the barges were first started down to Prince Rupert.

Q. What was the result of his investigation?

A. Those barges were unloaded.

Q. You say that this was at the time that what?

A. You asked me if anyone made investigations at other ports. Mr. Harris did, but the lumber was unloaded in that instance.

Q. Was any investigation made in Canada thereafter?

A. I have had communications with Mr. Youngs.

Q. What was the result of that investigation?

Mr. Andersen. I object to that as hearsay and calling for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

A. We were advised the longshoremen would not unload the lumber.

Q. Did that investigation apply in one place or more than one place?

Mr. Andersen. Same objection, hearsay and calling for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

A. Mr. Youngs; it was just Prince Rupert." (T.R. 692-695.)

(b) In excluding, except for a limited purpose, appellants' Exhibit C[10] upon which appellant Local 16 relied to establish the existence of an implied contract between itself and appellee. (T.R. 927, 930.)

[10]See, *supra*, page 20.

SUMMARY OF THE ARGUMENT.

I.

A determination by the board under Sec. 10(k) of the Labor Relations Act is a jurisdictional prerequisite to an action for damages under Sec. 303(a)(4) of the Act.

A. The inter-relation between Secs. 8(b)(4)(D) and 10(k) of the Labor Relations Act and Sec. 303(a)(4) of the Act compels this conclusion.

1. A jurisdictional prerequisite to an action under Sec. 303(a)(4) of the Act is the same as that to a proceeding under Sec. 8(b)(4)(D).

2. A Sec. 10(k) determination by the Board is a jurisdictional prerequisite to a finding that conduct is unfair under Sec. 8(b)(4)(D).

B. The doctrine of primary jurisdiction compels this conclusion.

II.

The trial court erred in holding that the District Court for the Territory of Alaska is a District Court of the United States, and prejudicial error to appellants resulted therefrom.

A. The District Court for the Territory of Alaska is not a District Court of the United States.

B. As a result of misconceiving its status, the trial court committed error prejudicial to appellants concerning matters of jurisdiction, service and agency.

III.

Prejudicial error to appellants resulted from the trial court's instructions to the jury.

IV.

Prejudicial error to appellants resulted from the trial court's rulings on evidence.

ARGUMENT.

I.

A DETERMINATION BY THE BOARD UNDER SEC. 10(k) OF THE LABOR RELATIONS ACT IS A JURISDICTIONAL PREREQUISITE TO AN ACTION FOR DAMAGES UNDER SEC. 303(a)(4) OF THE ACT.

A. THE INTER-RELATION BETWEEN SECS. 8(b)(4)(D) AND 10(k) OF THE LABOR RELATIONS ACT AND SEC. 303(a)(4) OF THE ACT COMPELS THIS CONCLUSION.

1. The jurisdictional prerequisite to an action under Sec. 303(a)(4) is the same as that to a proceeding under Sec. 8(b)(4)(D).

The language of Sec. 8(b)(4)(D) of the Labor Relations Act and Sec. 303(a)(4) of the Act is virtually identical. Sec. 8(b)(4)(D) provides:

> "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is forcing or requiring any

employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Sec. 303(a)(4) provides:

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is——

* * * * * * *

"forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work * * *"

That the same conduct is addressed by both sections is demonstrated not only by this identity of language, but also by the legislative history. In dis-

cussing the provisions of the Conference Bill which was subsequently adopted into the present Act, Representative Lesinski made the following statement in connection with Sec. 303 (a)(4):

> "* * * Employers are given a cause of action to recover any damages caused by the activities made unfair by section 8 (b) (4)." (93 Daily Cong. Rec. 9475, June 19, 1947, *Legislative History,* p. 12.)[11]

Stated in another way, only conduct made unfair by Sec. 8 (b) (4) (D) is actionable under the provisions of Sec. 303 (a) (4).

2. A Sec. 10(k) determination by the Board is a jurisdictional prerequisite to a finding that conduct is unfair under Sec. 8(b)(4)(D).

Sec. 10(k) of the Labor Relations Act provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary

[11]The Legislative History of the Labor-Management Relations Act of 1947 has been published by the Board in two volumes issued by the Government Printing Office in Washington, D.C., in 1948. For ease of reference, wherever citations to the legislative history occur in this brief, the specific reference to the bill, committee report or congressional debate in question will be followed by a citation to the page of this two-volume Legislative History at which the particular reference appears, as follows: *Legislative History,* page .....

adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The Board has consistently construed this provision to mean that it must make a determination under the section before a complaint charging a violation of Sec. 8(b)(4)(D) can issue, under Sec. 10(b) of the Act.[12]

The first instance of this interpretation by the Board is given by the Rules and Regulations and Statements of Procedure which it issued under the provisions of Sec. 10(k). Sec. 203.77 of the Board's Rules and Regulations provides:

"If, after issuance of certification by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the certification, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director may proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 203.9 to 203.51, inclusive, shall, insofar as applicable, govern."

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[12]The portions of Sec. 10(b) relevant to the issuance of complaints by the Board provide:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ."

Section 202.34 of the Board's Statements of Procedure provides:

> *"Compliance with certification; further proceedings.*—After the issuance of certification by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that parties are complying with the certification, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b),(4)(D) of the act, and the proceeding follows the procedure outlined in sections 202.8 to 202.15."

This initial interpretation by the Board of the relation between Secs. 10(k) and 8(b)(4)(D) with respect to all charges that the latter section was being violated received a flat challenge in the case of *Juneau Spruce Corp.*, 82 NLRB 650 (1949),[13] but the challenge was rejected, and the Board held squarely that it had no power to issue a complaint pursuant to the provisions of Sec. 8(b)(4)(D) prior to a determination by it under the provisions of Sec. 10(k). That case arose out of the same dispute which resulted in the filing of the action below in the trial court. The appellee here was the charging party before the Board. It contended that Sec. 10(k) gave the Board power to

[13]In an earlier case, *Moore Drydock Company*, 81 NLRB 1108 (1949), the Board made an identical holding, although there the issue was not raised by any of the parties.

hear and decide a jurisdictional dispute only where the rights of two or more competing unions in cases of overlapping certifications or orders of the Board were involved. It was argued that Sec. 10(k) was inapplicable in all other instances of inter-union conflict, and that in such cases the Board had the duty of proceeding at once to hearing on the substantive charge of violation of Sec. 8(b)(4)(D).

The Board answered this contention of the appellee here as follows:

> "We do not agree. We have held in the *Moore Drydock Company* case that, reading Sections 8(b)(4)(D) and 10(k) together, as we are required to do by the amended Act, the Board has no choice but to proceed 'to hear and determine' the dispute out of which the alleged unfair labor practice arose. The purposeful postponement of further proceedings (during the initial 10-day period); *the opportunity afforded the rival unions to reach a settlement* or to agree upon methods for reaching an adjustment of the dispute; the requirement that the charge be dismissed upon a showing that the dispute has been settled (during the initial stage) or compliance effected after the Board decision (the determination of dispute such as that made here), all lend persuasive support to the view that *Congress intended the Board first to attempt to resolve the controversy by means of a Section 10(k) determination.* It is only where it still is necessary thereafter to proceed with the unfair labor practice charge under Section 8(b)(4)(D)—in the event of noncompliance, for example, with the Determination of Dispute—that a complaint may be issued under

> Section 10(b). Thus, a Section 10(k) hearing has an effective function, and the Board a definite responsibility to discharge thereunder, to obviate the conventional unfair labor practice proceeding through a statutory device for expediting adjustment of such disputes. Moreover, in the absence of language specifically limiting the application of Section 10(k) to certain situations *only,* or even persuasive legislative history in support of such restricted application, the Board is obliged to give the effect to that Section which its language requires. The interpretation adopted here gives practical meaning to the concluding sentence in Section 10(k) which reads: 'Upon compliance by the parties to the dispute with the decision of the Board or *upon such voluntary adjustment of the dispute, such charge shall be dismissed.*" (Italics supplied; footnotes in the Board's decision are omitted.)

In subsequent cases, the Board has consistently followed this view of its function under Sec. 10(k) and the relation of that section to Sec. 8(b)(4)(D). In *Irwin-Lyons Lumber Co.,* 82 NLRB 916 (1949), the contention was made on a petition for rehearing by one of the parties that the hearing conducted under Sec. 10(k) is governed by the Administrative Procedure Act. In denying the motion for rehearing, the Board stated:

> "We do not agree. Under Section 202.32 of the Board's Rules and Regulations—Series 5, as amended, the hearing under Section 10(k) is nonadversary in character, and, according to the procedure adopted therefor, conducted in the same

way as a hearing in a representation proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies."

See, also, *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (1950); *Stroh Brewery Co.,* 88 NLRB No. 169 (1950); and *Ship Scaling Contractors Ass'n.,* 87 NLRB No. 14 (1949).

Finally, in the case of *Juneau Spruce Corp.,* 90 NLRB No. 233 (1950), the Board made it plain that a determination by it under Sec. 10(k) which had not been complied with was essential to a finding of a violation of Sec. 8(b)(4)(D). The Board stated:

"*All* the factors essential to a violation of this section of the amended Act are present: By picketing the Company's premises, the Respondents induced and encouraged the Company's mill and millyard employees to engage in a concerted refusal in the course of their employment to perform services for the Company; the Respondents' object was to force the Company to assign the bargeloading work to the members of Local 16, or workers dispatched by Local 16, instead of to the mill and millyard employees; the Company

was not failing to conform to a certification of the Board determining the bargaining representative of the employees performing the bargeloading work, for there has been no such certification; *and, finally, the Respondents did not comply with the Board's Decision and Determination of Dispute in the previous proceeding held under Section 10(k) of the Act.*" (Italics supplied; footnotes in the Board's decision are omitted.)

It is submitted that this construction of the two sections by the Board is the only proper one that can be made.[14] It is supported not only by the reasons advanced by the Board in the first *Juneau Spruce* case and other decisions, but also by the legislative history of Secs. 10(k) and 8(b)(4)(D).

The treatment which the respective Houses of Congress gave jurisdictional disputes in the bills which originated in each was vitally disparate. H.R. 3020, the House version of the legislation, outlawed entirely concerted action by labor organizations arising out of

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[14]As the interpretation of the administrative agency charged with the duty of enforcing the legislation, it is entitled to great weight. *New York, New Haven and H.R. Co. v. Interstate Commerce Commission,* 200 U.S. 361 (1906); *Shapiro v. United States,* 335 U.S. 1 (1948). Particularly is this true with respect to the legislation here under discussion. Sections 401, 402, and 403 of the Act established a joint congressional committee known as the Joint Committee on Labor-Management Relations, a duty of which was to report to Congress on the administration and operation of existing federal laws relating to labor relations. The construction which the Board has placed on Sec. 10(k) has come directly to the attention of Congress through the reports of this committee. (Rep. No. 986, Part 3, 80th Cong., 2d Sess., at page 57.) The continued existence of the Act in its original state attests to the fact that the Board is carrying out the legislative intent in its administration of Secs. 10(k) and 8(b)(4)(D).

jurisdictional disputes.[15] The Senate, however, adopted a different approach. Recognizing that jurisdictional disputes were in a special category and that experience had shown that obstructions to commerce arising from them could best be removed not by outlawing them completely but by a fair adjustment of them, the Senate provided for such an adjustment in its bill, S. 1126. Thus, when the Senate bill was reported to the Senate by its Committee on Labor and Education, it was made clear that Sec. 10(k) of that bill had been derived from the bill originally introduced by Senator Morse to deal with jurisdictional disputes.[16]

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[15]This was accomplished by the provisions of Secs. 2(15) and 12(a)(3)(A).

Section 2(15) provided as follows:

"The term 'jurisdictional strike' means a strike against an employer, or other concerted interference with an employer's operations, an object of which is to require that particular work be assigned to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (*Legislative History,* pages 42-43.)

Section 12(a)(3)(A) provided as follows:

"The following activities, when affecting commerce, shall be unlawful concerted activities: * * *

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises." (*Legislative History,* pages 77-78.)

[16]Senator Morse stated:

"I am very happy that on March 10, in a speech which I am sure my colleagues at the time thought was too long, I laid the foundation for my proposals for amendments to the Wagner Act. At that time I offered S. 858, containing the specific proposals which I recommended in that speech insofar as the Wagner Act was concerned. I am very pleased that in the bill which we are reporting today practically all of the provisions of S. 858 are contained in it plus some refinements of S. 858 which I have developed on the issues since my speech on March 10, 1947." (*Legislative History,* pages 1000-1001.)

S. 858 provided that jurisdictional disputes be dealt with by arbitration.

Sections 8(b)(4)(D) and 10(k) of S. 1126 provided as follows:

Sec. 8(b)(4)(D): "It shall be an unfair labor practice for a labor organization or its agents——

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment * * * (D) for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work tasks * * *" (*Legislative History,* pages 112-114.)

Sec. 10(k): "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or the arbitrator

> appointed by the Board *or upon such voluntary adjustment of the dispute,* such charge shall be dismissed. The award of an arbitrator shall be deemed a final order of the Board." (Italics supplied.) (*Legislative History,* pages 130-131.)

Senate Report No. 105 on S. 1126 explained these sections as follows:

> "Jurisdictional disputes that constitute unfair labor practices within the meaning of section 8(b)(4)(D) may be heard by the Board or an arbitrator unless within 10 days the parties satisfy the Board that *they have adjusted the dispute or agreed to methods for adjusting it.* If the parties comply with the determination of the Board or the arbitrator appointed by it, *or voluntarily adjust the dispute,* the Board shall dismiss the charge. Finally, the award of the arbitrator is given the same status and force as a final order of the Board, a provision which will avoid the necessity of the Board hearing the dispute if it has designated an arbitrator for that purpose and also will permit the Board to seek enforcement of the award without further proceedings." (Italics supplied.) (*Legislative History,* page 433.)

When the conference of the two houses had met, considered the differing versions of the bills they had initially passed, and then reported to their respective houses the bill which subsequently became the Act, House Conference Report No. 510 on H.R. 3020 had this to say with respect to the version finally adopted:

> "The Senate amendment also contained a new section 10(k), which had no counterpart in the House bill. This section would empower and direct the Board to hear and determine disputes between

unions giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes). The conference agreement contains this provision of the Senate amendment, amended to omit the authority to appoint an arbitrator. If the employer's employees select as their bargaining agent *the organization that the Board determines has jurisdiction,* and if the Board certifies that union, the employer will, of course, be under the statutory duty to bargain with it." (Italics supplied.) (*Legislative History,* page 561.)

This legislative history establishes that the view of the Senate concerning the best method with which to deal with jurisdictional disputes prevailed, and that the bill as finally enacted embodied a basic distinction between such disputes and secondary boycotts, concerning which no procedure analogous to that of Sec. 10(k) was included. The emphasis with respect to jurisdictional disputes was on a settlement of the dispute on its merits. Should the parties themselves fail to settle the dispute, the determination of the dispute was left with the Board. It was only when the parties to the dispute failed to comply with the determination of the Board that concerted activities of labor organizations in connection with such a dispute were to become unfair.

This consideration of the legislative history of the sections of the Labor Relations Act relating to jurisdictional disputes and of the Board's decisions construing such sections demonstrates conclusively that a Sec. 10(k) determination of the Board, and a noncompliance therewith, is a jurisdictional prerequisite

to a finding by the Board that conduct has been unfair under Sec. 8(b)(4)(D). In view of what has already been said concerning the identity of meaning between Sec. 8(b)(4)(D) of the Labor Relations Act and Sec. 303(a)(4) of the Act, it follows that a Sec. 10(k) determination is also a necessary jurisdictional prerequisite to the maintenance of an action under Sec. 303(a)(4).

It has been shown thus far that since the language of Sec. 303(a)(4) must be construed in the light of the meaning of Sec. 8(b)(4)(D), there can be no cause of action under the former section until there has been a determination by the Board under Sec. 10(k). But it might be argued that the language of Sec. 303(a)(4) makes no mention of a prior Board determination under Sec. 10(k), and hence that it should be interpreted standing alone. It might be claimed that thus interpreted, all that would be required to establish a cause of action under this section would be proof that a labor organization had picketed an employer for the purpose of forcing him to assign particular work to employees whom it represented, rather than to other employees, and that at the time of such picketing the employer was not failing to conform to a Board certification following an election to determine a collective bargaining representative. Under such a view it would be immaterial whether or not the Board had ever made a determination of the dispute under Sec. 10(k), and, if it had, it would be immaterial when such a determination was handed down, and whether or not it had been complied with.

It is submitted that such an interpretation of Sec. 303(a)(4) is untenable. It would, in the first place, fly in the face of the Congressional intent already mentioned[17] to make unlawful under Sec. 303(a)(4) only such conduct as is made unfair by Sec. 8(b)(4)(D). Secondly, and equally important, it would make the provisions of the Act and the Labor Relations Act dealing with jurisdictional disputes inconsistent with each other and wholly unworkable. Specifically, it would lead to the following results, among others:

(a) A Board determination could be made under Sec. 10(k) that the employees represented by one union, rather than the employees represented by another, were entitled to perform particular work for an employer. Such a determination would not depend on a prior certification of the union whose rights to the work were upheld. It could be based on such criteria as the "custom in the trade and in the area, the constitutions and peace treaties of the contending labor organizations themselves, the technological evolution of the disputed tasks, and [the] like * * *",[18] or on the construction of collective bargaining agreements held by rival unions with the same employer.[19] If the employer refused to abide by the Board's determination, the union's only effec-

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[17]See the remarks of Representative Lesinski, quoted at page 37, *supra*.

[18]All of which are mentioned as guides to the Board in *Juneau Spruce Corp.*, 82 NLRB 650 (1949), dissenting opinion of Member Murdock, at footnote 21.

[19]This was the chief basis for the Board's determination in *Winslow Bros. and Smith Co.*, 90 NLRB No. 188 (1950).

tive recourse would be to picket his premises to require him to abide by it. It could not file an unfair labor practice charge against him, for an employer's refusal to abide by a Sec. 10(k) determination of the Board is not made an employer unfair labor practice. Yet, despite the fact that picketing to enforce a Sec. 10(k) certification is not an unfair labor practice, if the interpretation of Sec. 303(a)(4) which is under discussion were followed, the employer could sue and collect damages from a union so picketing.

(b) An employer could re-assign work done by employees represented by one labor organization to the employees represented by another, without any justification therefor. In such a case, the Board might find that the first group of employees were rightfully entitled to continue to perform the particular work. Especially would this be the case if the labor organizations themselves, by a jurisdictional pact, had previously agreed to the division of work originally existing. The first labor organization, or both of them, might picket the employer to correct the inequitable situation. The employer could prevent a final Board determination enforceable in the courts by the simple expedient of refusing to file charges under Sec. 8(b)(4)(D) against either labor organization. Instead, under this view of Sec. 303(a)(4), he could sue either or both for damages, and prevail. He would thus be rewarded for creating the very obstruction to commerce which the Act is designed to prevent.

That Congress did not intend such results to flow from Sec. 303(a)(4) is manifest. The section was not created to nullify the results to be achieved by the Board under Sec. 10(k). It was designed to implement the remedies available to employers against unions which persisted in seeking particular work for employees they represented *after an adverse Board determination under Sec. 10(k).* Conversely, it could hardly have been intended to create a cause of action on behalf of employers who themselves refused to abide by a Board determination under Sec. 10(k), or *who refused to avail themselves of the machinery of the Board* which Congress intended was to be employed in the first instance in order to achieve a determination of the dispute binding on all the parties.

Once it is seen that there must be non-compliance with the Board's determination of the dispute before conduct becomes actionable under Sec. 303(a)(4), it becomes clear that the trial court erred in finding that it had jurisdiction to proceed upon appellee's complaint. The complaint failed to allege that a determination of the Board under Sec. 10(k) adverse to the appellants had been made, such a determination was not considered by the court as an essential element of appellee's cause of action (Instruction No. 5, T.R. 50-51), and none was proved to have taken place before April 10, 1948, the day from which appellee claimed damages.[20] It is plain, then, that

[20]The determination of the Board, which was introduced in evidence as Appellee's Exhibit 20, was issued by the Board on *April 1, 1949*, and involved only Local 16 and *not the International.* It was introduced for the limited purpose of showing that Local 16 had not been certified by the Board as the bargaining representative of any of the employees at appellee's mill in Juneau. (T.R. 793, 1056.)

whether it be considered for lack of jurisdiction, or for failure of the complaint to state a cause of action, the judgment which awarded appellee damages for conduct that long preceded the Board's determination under Sec. 10(k) was erroneous, and should be reversed.

B. THE DOCTRINE OF PRIMARY JURISDICTION COMPELS THIS CONCLUSION.

There is one further ground upon which the jurisdiction of the trial court to proceed in a Sec. 303(a)(4) case could arguably be upheld, in the absence of allegations that the Board had determined the controversy in a Sec. 10(k) proceeding. It could be asserted that the provisions of Sec. 303(b), giving the court jurisdiction to entertain a cause of action for damages for conduct covered by Sec. 303(a)(4), invest the court with jurisdiction concurrent with that of the Board to make a determination of the dispute. Thus, it might be contended, in such an action, the court could first decide whether or not the defendant labor organization was entitled to have the employees it represented perform the work in question. If this determination was adverse to the defendant, the court could then decide whether the labor organization had in fact engaged in the concerted activities for the object prohibited by the statute, and what damages, if any, proximately resulted therefrom.

The short answer to such a position is that even if it were tenable, it was not the theory upon which the court below tried this case. None of its instructions gave the jury the task of determining whether the employees that Local 16 represented were entitled

to perform the work of loading appellee's barges. Nor did the trial court rule as a matter of law that the longshoremen represented by Local 16 were not so entitled. It made no such ruling because it did not conceive it an issue in the case. It thus is apparent that the judgment is erroneous, even if it be conceded, *arguendo,* that this meaning of Secs. 303(a)(4) and 303(b) is the correct one.

Moreover, an examination of this view on its merits demonstrates that it is incorrect. The principle of statutory construction which makes this manifest is the doctrine of primary jurisdiction. That doctrine was first enunciated by the Supreme Court in the case of *Texas and Pacific Railway v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). It provides that when concurrent administrative and judicial jurisdiction for the redress of asserted statutory wrongdoing exists, the courts shall have no jurisdiction to proceed until the agency has acted in the first instance, and has made its preliminary administrative determination concerning the character of the complained of conduct. The doctrine, evolved to preserve the power of the Interstate Commerce Commission to establish a comprehensive, non-discriminatory and just scheme of regulation over the nation's railroads, has equal application to the power of the National Labor Relations Board to establish uniform criteria for the resolution of jurisdictional disputes tending to burden interstate commerce.

An examination of the *Abilene* case will illuminate the meaning of the doctrine, the reasons for its enunciation by the Supreme Court of the United States,

and show its clear applicability here. The case involved a suit by an oil company against a railroad to recover charges in excess of what were just and reasonable rates for hauling performed by the latter for the former. The action was based on the shipper's right at common law to recover such excesses. The Interstate Commerce Act had preserved this common law right to shippers in Sec. 22 thereof, which provided:

> "* * * [N]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies * * *" (49 USCA Sec. 22.)

In addition, Sec. 9 of that Act provided:

> "Any person * * * claiming to be damaged by any common carrier subject to the provisions of this Act, may either make complaint to the Commission * * * or may bring suit in his * * * own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person * * * shall not have the right to pursue both of said remedies * * *" (49 USCA Sec. 9.)

In the face of a clear common law right to maintain the action, which had been preserved by Sec. 22 of the Act, the Supreme Court reversed a judgment in the lower court for the plaintiff, holding that the lower court had no jurisdiction of the action. It stated that:

> "* * * [A] shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to regulate commerce—primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable * * *" (204 U.S. 426, at 448.)

The court advanced cogent reasons for its decision. Were courts, and necessarily juries, to be permitted to determine reasonableness of rates, the very purposes for which the Interstate Commerce Commission was created would be frustrated, and the manifest advantage of administrative determination of rates destroyed. The Congress had established the Commission in the first instance in order that uniform and fair rates throughout the nation could be achieved, based on the special skills and techniques unique to the administrative process. If courts, and juries, could make determinations of reasonableness on a case by case basis, the legislative purpose would be completely nullified.

If courts, and necessarily juries, were permitted, in actions under Sec. 303(a)(4) of the Act, to make a determination concerning whether or not the labor organization being sued had a right to the work in question, similar evils would flow under this Act. The uniformity of criteria and the specialized techniques which are available to the Board would be absent when the determination took place in court. A labor organization which the Board had held had a right

to the work in question, and which had properly pursued this determination of the Board in the face of an employer refusal to accept it, could not rely on the Board's determination, for a jury might differ with the Board on the organization properly entitled to the work. Different juries in different parts of the country might arrive at totally opposite conclusions concerning a jurisdictional dispute which was nation-wide in scope, and thus nullify a determination of the Board which was entitled to and had been given nation-wide effect. The Congressional purposes in giving the Board authority uniformly and effectively to settle jurisdictional disputes would be completely subverted.

The rule of primary jurisdiction established by the Supreme Court in the *Abilene* case has been consistently followed in cases under the Interstate Commerce Act.[21]

The general applicability of the rule has been demonstrated in cases arising under the Natural Gas Act,[22] the Railway Labor Act,[23] and the Packers and

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[21]*Baltimore & O. R.R. v. U.S. ex rel. Pitcairn Coal Co.*, 215 U.S. 481 (1910); *United States v. Pacific & Artic Co.*, 228 U.S. 87 (1913); *Morrisdale Coal Co. v. Pennsylvania R.R.*, 230 U.S. 304 (1913); *Texas & Pac. Ry. v. American Tie Co.*, 234 U.S. 138 (1914); *Northern Pac. Ry. v. Solum*, 247 U.S. 477 (1918); *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456 (1924); *Western & A. R.R. v. Public Service Commission*, 267 U.S. 493 (1925); *Midland Valley R.R. v. Barkley*, 276 U.S. 482 (1928); *Bd. of Railroad Commissioners v. Great N. Ry.*, 281 U.S. 412 (1930); *St. Louis, B. & M. Ry. v. Brownsville Nav. Dist.*, 304 U.S. 295 (1938); *Armour & Co. v. Alton R.R.*, 312 U.S. 195 (1941).

[22]*Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6 Cir., 1949).

[23]*Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946).

Stockyards Act.[24] *Order of Railway Conductors v. Pitney,* 326 U.S. 561 (1946), is particularly illuminating on the application of the doctrine to a statute giving an administrative agency power to adjudicate a jurisdictional dispute. Here, also, to use the language of the Supreme Court in that case, Congress has "designated an agency particularly competent to handle the basic question * * * involved." *(Ibid.,* at 566.)

In these cases, the courts held that the preliminary determination of the administrative agency is a jurisdictional prerequisite to court action, even though by the terms of the statute expressly, or by its terms taken in connection with common law remedies, there appears to be full concurrent jurisdiction to proceed in both bodies. These authorities make it plain that the judgment of the court below cannot be supported on any theory of the meaning of Sec. 303 of the Act. For even if it be claimed that the jury in the trial court did determine the dispute adversely to Local 16 in its consideration of the case,[25] the doctrine of primary jurisdiction proves that the court below, and the jury, had no right to make such a determination. The statute requires that this be done by the Board in the first instance. As has already been explained, *supra,* page 51, the infirmity in the judgment below was not corrected because the Board finally issued its determination on April 1, 1949. Accordingly, the judgment must be reversed.

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[24] *Sullivan v. Union Stockyards Co.*, 26 F.2d 60 (8 Cir., 1928).

[25] As has been indicated, *supra*, page 52, this question was not even submitted to the jury.

II.

THE TRIAL COURT ERRED IN HOLDING THAT THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS A DISTRICT COURT OF THE UNITED STATES, AND PREJUDICIAL ERROR TO APPELLANTS RESULTED THEREFROM.

Sec. 303(b) of the Act provides that persons injured in their business or property by reason of alleged violations of Sec. 303(a) thereof may sue therefor "in any District Court of the United States subject to the limitations and provisions of Sec. 301 hereof without respect to the amount at controversy, or in any other court having jurisdiction of the parties * * *"

The trial court proceeded on the assumption that it was a "District Court of the United States". This is manifest from its order denying International's motion to quash service (T.R. 14, 21-22), from its order overruling appellants' demurrer (T.R. 21-22), from the opinion it delivered in connection with the said order (83 F. Supp. 224), and from the instructions it gave to the jury on the question of agency (T.R. 49). This erroneous assumption of a status it did not have, led the trial court into serious error. Before considering the extent of the error, we shall demonstrate that the trial court was not a "District Court of the United States."

A. THE DISTRICT COURT FOR THE TERRITORY OF ALASKA IS NOT A DISTRICT COURT OF THE UNITED STATES.

The phrase "District Court of the United States" having for many years had a clear, precise and well-settled meaning (Cf. *International etc. v. Wirtz,* 170 F.(2d) 183 [1948]), the court must presume the Con-

gress intended that meaning in 1947 when it used that phrase in the Act. (*Old Colony etc. v. Commissioner,* 284 U.S. 552 [1932]; *Deputy v. DuPont,* 308 U.S. 488 [1940]; *United States v. Stewart,* 311 U.S. 60 [1940]; *Shapiro v. United States,* 335 U.S. 1 [1948].)

The meaning which the phrase in question had received by 1947 excluded from its scope the District Courts for the territories, including the District Court for the Territory of Alaska.

In *Mookini v. United States,* 303 U.S. 201 (1938), the Supreme Court considered the status of the District Court of the Territory of Hawaii (a court in many respects analogous at that time in its creation and jurisdiction to the District Court for the Territory of Alaska). The precise problem in the *Mookini* case was whether or not the Criminal Appeals Rules which had been promulgated pursuant to the Act of March 8, 1934, 48 Stat. 399, applied to the District Court for the Territory of Hawaii. The rules themselves provided that they were applicable to "District Courts of the United States". The Supreme Court held that the District Court for the Territory of Hawaii was not a District Court of the United States within the meaning of the rules.

> "The term 'District Courts of the United States' as used in the rules, without an addition expressing a wider connotation, has its historical significance. It describes the constitutional courts created under Article III of the Constitution. Courts of the territories are legislative courts, properly speaking, and are not District Courts of the

> United States. We have often held that vesting a territorial court with jurisdiction similar to that vested in the District Courts of the United States does not make it a 'District Court of the United States'. Reynolds v. United States, 98 U.S. 145; In re Mills, 135 U.S. 263; McAllister v. United States, 141 U.S. 174; Stephens v. Cherokee Nation, 174 U.S. 445; Summers v. United States, 231 U.S. 92; United States v. Burroughs, 289 U.S. 159." (303 U.S. 201, at 205.)

This decision was applied to the District Court of the Panama Canal Zone in *Schackow v. Canal Zone,* 104 F.(2d) 681 (1939), and was substantially followed as far as the District Court of Puerto Rico is concerned in *Puerto Rico etc. v. Colom,* 106 F.(2d) 345 (1939). See, also, *Balzac v. Porto Rico,* 258 U.S. 298 (1922).

The cases directly involving the District Court for the Territory of Alaska indicate a similar result.

The first case on the question of the nature of the court in Alaska is *McAllister v. United States,* 141 U.S. 174 (1891). This case arose on the petition of McAllister, who had been appointed a judge of the District Court for the Territory of Alaska, to recover his wages after his removal from office by the President. He relied upon Rev. Stat. 1768 which provided that judges of the "courts of the United States" could not be so removed. The Supreme Court held that the District Court for the Territory of Alaska, although it had the same jurisdiction as the District Courts of the United States, was not a "court of the United States" within the meaning of the revised statute in

question, and consequently the claim for the payment of salary was denied.

To the same effect with respect to the Alaska court, see *In re Cooper,* 143 U.S. 472 (1892); and *Coquitlam v. United States,* 163 U.S. 346 (1896).

Carscadden v. Territory of Alaska, 105 F.(2d) 377 (9 Cir., 1939), followed these earlier decisions and held that the District Court for the Territory of Alaska was not a constitutional court, thereby enabling this Court to exercise its independent judgment on appeals from the Alaska court.

As we have said, Congress is presumed to have known in 1947 when it enacted Sec. 303(b) of the Taft-Hartley law, that by using the phrase "District Court of the United States", it was using a term which had the definite and fixed judicial meaning described above. This meaning excluded from the purview of the phrase used the District Court for the Territory of Alaska as well as certain other territorial courts. As a matter of fact, it is probable that Congressional realization that the phrase "District Court of the United States" did not embrace the territorial courts was one of the factors which gave rise to the conferring in Sec. 303(b) of jurisdiction upon "any other court having jurisdiction of the parties." Thus in those territories where there was not a "District Court of the United States," the remedies provided by 303 could be enforced in the territorial courts of general jurisdiction.[25a]

[25a]However, as we will indicate below, there are substantial differences with respect both to procedure and substance depending on the court in which the action is brought.

There are many examples from Congressional legislation which demonstrate that over the years Congress has been aware of the distinction between courts in the territories and those which may truly be denominated "District Courts of the United States." An example will suffice to make the point here.

In 1946, just one year before it enacted the statute here in question, when Congress desired to apply the Federal Rules of Criminal Procedure to the courts in the territories, it specifically so stated. In 18 U.S. C.A. [old] 687, it provided that the Supreme Court should have the power to prescribe rules of criminal procedure "in District Courts of the United States, including District Courts of Alaska, Hawaii, etc., etc." And Rule 54(a)(1) of the Federal Rules of Criminal Procedure specifically provided that the Rules applied to all criminal proceedings "in the District Courts of the United States, which include the District Courts of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, etc., etc."

With this statutory and case background, it is perfectly apparent that had Congress intended the trial court to have jurisdiction over suits brought under Sec. 303 of the Act as a District Court of the United States, it would not have used the phrase "any District Court of the United States" without more. On the contrary, it would have said, as it did in the other situations referred to above, "any District Court of the United States, including the District Court for the Territory of Alaska, etc., etc."

The failure to make a specific reference to the District Court for the Territory of Alaska can only mean, in view of the foregoing, that Congress did not intend that court to have jurisdiction of suits brought under Sec. 303 as a District Court of the United States.

Perhaps the most definitive illustration of this point is to be found in the new Judicial Code adopted in 1948 just one year after the passage of the Taft-Hartley Act. There Congress had an opportunity most carefully to review the entire judicial structure of the United States and to define what it meant by the terms which had been used in the legislation and court decisions throughout the years. Clearly, by the adoption of the new Title 28, Congress did not intend, except where it specifically so stated, to create any new or different law from that which had previously obtained, but intended only to revise, recodify and clarify a pre-existing law concerning the judiciary of the United States.

Chapter 5 of Title 28 is captioned: "District Courts". Sections 81 through 131 contained in Chapter 5 create the judicial districts of the United States. In addition to the judicial districts within the continental limits of the United States (i.e., in the forty-eight states), judicial districts are there created for the District of Columbia (28 U.S.C. 88), Hawaii (28 U.S.C. 91), and Puerto Rico (28 U.S.C. 119). No judicial district is created for Alaska.

Section 132 of Title 28 provides:

> "There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district."

Since there is no judicial district created for Alaska, the court in Alaska cannot be a District Court of the United States within the meaning of Sec. 132 of Title 28.

Section 451 of Title 28 defines the phrase with which we are here concerned, i.e., "District Court of the United States", as "the courts constituted by Chapter 5 of this title." This obviously does not include the District Court for the Territory of Alaska. Similarly, 28 U.S.C. 610, in defining the broader term "courts", distinguishes between "District Courts of the United States" on the one hand, and "the District Court for the Territory of Alaska" and certain other territorial courts, on the other.

The revisers of the Judicial Code expressly recognized what they were doing with respect to the District Courts in the District of Columbia, Hawaii and Puerto Rico.

The Reviser's Note to Sec. 88, *supra,* which created the judicial district for the District of Columbia, says:

> "This section *expressly* makes the District of Columbia a judicial district of the United States."

The Reviser's Note to Secs. 1291 and 1292 states:

> "The District Courts for the districts of Hawaii and Puerto Rico are embraced in the term 'District Courts of the United States' (see definitive section 451 of this title)."

The Supreme Court has relied upon these very Reviser's Notes to assist it in determining the nature of the District Court in Hawaii (*Stainback v. Mo*

Hock Ke Lok Po, 336 U.S. 368 (1949), at 376, Footnote 12) and has indicated that the Alaska Court stands on a different footing (*ibid.,* at 376, Footnote 11).

Furthermore, the Reviser's Notes state that 28 U.S.C. 91, dealing with Hawaii, is based upon Secs. 641 and 642(a) of Title 48 U.S.C. and that 28 U.S.C. 119, dealing with Puerto Rico, is based upon Secs. 863 and 864 of Title 48 U.S.C. These sections of 48 U.S.C. which had to do with the Courts in Hawaii and Puerto Rico were incorporated into the new Title 28 in 1948 and were for that reason repealed by Sec. 39 of the Act of June 25, 1948, Chapter 646, which enacted the new Judicial Code.[26]

However, those provisions of Title 48 which have to do with the District Court for the Territory of Alaska (48 U.S.C.A. 101, *et seq.*), the Courts in the Canal Zone (48 U.S.C.A. 1344 *et seq.*), and the Courts in the Virgin Islands (48 U.S.C.A. 1405, *et seq.*), have not been repealed since they were not placed in the new Judicial Code as were the analogous sections dealing with the District of Columbia, Hawaii and Puerto Rico.

In adopting the new Judicial Code, Congress did not overlook the Courts in Alaska, the Canal Zone or the Virgin Islands by inadvertence. The Judicial Code—i.e., Title 28—is, technically speaking, Sec. 1 of the Act of June 25, 1948, Chapter 646. Sections 9 to 13 *of that act* (not of Title 28) are amendments in vari-

[26]See pages 1668 and 1663, respectively, of the paper-bound (1948) edition of Title 28.

ous particulars of sections of 48 U.S.C. dealing with the District Court for the Territory of Alaska; similarly, Sec. 31 of that act is an amendment to the Canal Zone code (48 U.S.C. 1353) dealing with the Court in the Canal Zone; and Secs. 28 and 30 of that act are amendments to sections of 48 U.S.C. dealing with the Court in the Virgin Islands.

Thus it is clear that in 1948, only one year after the passage of the Taft-Hartley Act, while Congress in enacting the Judicial Code changed the prior status of the District Courts for the District of Columbia, the Territory of Hawaii, and Puerto Rico, and made them "District Courts of the United States", it deliberately did not make such a change in the status of the District Courts for the Territory of Alaska, the Canal Zone, or the Virgin Islands.[27]

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[27]Other evidence that Congress recognized that the Alaska Court occupied a different status from that of a "District Court of the United States" is to be found in the following Reviser's Notes to Title 28:

(a) Secs. 501, 502, 504 which deal with United States attorneys:

"Words 'including the District of Columbia' were omitted, because the District of Columbia is made a judicial district by section 88 of this title." (501)

"The exception of Alaska * * * was omitted as covered by section 109 of Title 48, U.S.C., 1940 ed., Territories and Insular possessions * * *" (502)

"Reference to the territories * * * was also omitted as covered by the provisions of Title 48, U.S.C., 1940 ed., Territories and Insular possessions. See sections 109 and 112 of such title applicable to United States attorney in Alaska, and 1353 applicable in the Canal Zone, and 1405y applicable in the Virgin Islands." (504)

(b) Secs. 541, 542, 545 which deal with United States marshals, and contain substantially the same provisions as those just referred to.

(c) Secs. 631 and 633 which deal with United States Commissioners:

"This revised section by its terms limits the section and Chapter 43 of this title to commissioners appointed by a 'district

Why Congress chose to leave the Alaska Court in the same status as the Courts in the Canal Zone and the Virgin Islands is a question that we cannot an-

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court' which includes the courts enumerated in chapter 5 of this title but not those of Alaska, Canal Zone or Virgin Islands." (631)

"The words 'in each judicial district' limit the section to the commissioners in the districts enumerated in chapter 5 which includes Hawaii, Puerto Rico and District of Columbia but omits Alaska, Canal Zone, and Virgin Islands." (633)

(d) Sec. 751 which deals with District Court clerks:

"Provision for similar offices in Alaska, Canal Zone, and the Virgin Islands is made by sections 106, 1349 and 1405y, respectively, of Title 48, U.S.C., 1940 ed."

See also 28 U.S.C. 753 where, when Congress wanted to have the courts in the territories as well as the district courts appoint court reporters, it provided as follows:

"(a) Each district court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall appoint one or more court reporters."

Compare the Reviser's Note to the foregoing section with the Reviser's Notes heretofore referred to.

Finally, see the Senate Report on Title 28—i.e., Senate Report 1559, 80th Congress, 2d Session—wherein is discussed an amendment to the House version of Title 28 with respect to jurisdiction over suits against the United States. In the House version the section which is now 28 U.S.C. 1346(b) gave such jurisdiction to "district courts *including the district courts for the Territories and Possessions of the United States.*" The Senate struck out the italicized words and amended the phrase to give jurisdiction to "the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands."

In explaining this amendment the Senate Report stated that it was necessary to conform the section taken from the Tort Claims Act to the revision in which the courts in at least two territories or possessions—Hawaii and Puerto Rico—are included, by virtue of 28 U.S.C. 451, in the term "district court".

"The district courts for Hawaii and Puerto Rico therefore need not be specifically referred to. On the other hand in at least one of the possessions there are local district courts which are not intended to have tort-claim jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining territories and possessions thus makes for clarity and precision."

See pages 1680-1681 of the paper-bound (1948) edition of Title 28.

swer. But the fact is crystal clear from an examination of the legislation that that is exactly what Congress did. The wisdom or lack of wisdom in making these clarifications and in grouping the Alaska Court with the Courts of the other two territories, while giving a full-fledged District Court status to the Courts in Hawaii, the District of Columbia, and Puerto Rico, is something for Congress to determine.

It is not for this or any other Court to modify or change the status or nature of the Alaska Court (*Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 1 [1895]; *Commissioner v. Gottlieb,* 265 U.S. 310 [1924]; *Kalb v. Feuerstein,* 308 U.S. 433 [1940]; *United States v. Cooper Corp.,* 312 U.S. 600 [1941]), which the foregoing shows was not a District Court of the United States in 1947 when the Taft-Hartley Act was passed, and which is not such a court today. There can be no question whatsoever that the District Court for the Territory of Alaska never was, and is not now, a "District Court of the United States", within the meaning of Sec. 303 of the Act.

Neither of the two main grounds relied upon by the trial court to justify its contrary conclusion (83 F. Supp. 224, 226) is tenable.

In the first place, while the trial court recognized that the phrase "District Court of the United States" without more does not mean the territorial courts, and while it cited this Court's decision in *International Longshoremen's, etc. v. Wirtz,* 170 F. (2d) 183 (9 Cir., 1948), (See, 83 F. Supp. 224 at 225), it suggested that to apply this definition here would lead to difficulties in the enforcement of the statute in other re-

spects (ibid. at 226). It said, for example, that the power of the Board to apply for injunctive relief under Sec. 10(1) of the Labor Relations Act[28] or to seek enforcement of an order while the Circuit Court is in vacation, under Sec. 10(e),[29] might be hindered or embarrassed by applying the definition of the phrase required by the authorities. The difficulty with this argument, assuming it is applicable to the case at bar, is that it calls upon the judiciary to correct supposed gaps left, or errors made, by the legislature. This, of course, is not a judicial function. If the application of the proper definition of the phrase used in the Act leads to the difficulty suggested, the remedy, of course, is to apply to the legislature for redress.

In *Bate Refrigerating Co. v. Sulzberger, supra,* the Supreme Court said:

> " 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.' Denn v. Reid, 10 Pet. 524, 527." (157 U.S. 1, at 37.)

In *United States v. Cooper Corp., supra,* the same Court said:

> "But it is not our function to engraft on a statute additions which we think the legislature logically

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[28]This section is found in Title I of the Act and not in Title III, wherein is contained Sec. 303. See Note 1, *supra.*

[29]This section is also found in Title I.

might or should have made." (312 U.S. 600, at 605.)

In the second place, the trial Court was concerned lest the definition urged upon it would preclude the appellee or persons similarly situated from any relief whatsoever. (See, 83 F. Supp. 224 at 226. It apparently feared that if it applied the correct definition and held that it was not a District Court of the United States, the suit would have had to be dismissed and that no relief could have been obtained in Alaska (and presumably in other territories if the suit arose there). Again, if true, that is a matter properly to be addressed to the Congress and not to be remedied by judicial tampering with the legislation. However, Sec. 303(b) gives jurisdiction not only to District Courts of the United States but also to any other court having jurisdiction of the parties, and clearly the Alaska Court,[30] assuming it had jurisdiction of the parties, could have proceeded with the suit on the basis of the latter proviso.[31]

It is not unusual for Congress to create a cause of action and place its enforcement in different forums where different rules of procedure as well as substantive law may apply. Examples come readily to mind. A seaman may elect to sue under the Jones Act[32] in the state or federal court,[33] and if in the latter, either

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[30]Cf. *Coquitlam v. United States, supra.*

[31]In such a case, however, there would be a substantial difference in both the substantive law applicable and the procedure to be followed, as we shall point out below.

[32]46 U.S.C.A. 688.

[33]*O'Donnell v. Great Lakes, etc.*, 318 U.S. 36 (1943); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Engel v. Davenport*, 271 U.S. 33 (1926).

at law or in admiralty,[34] and depending upon his election, different rules of procedure will govern his cause.[35] Damage actions for violations of price and rent control statutes[36] also may be brought in either forum and different rules are applicable.

So, here, the action may have been maintained in the trial court not as in a District Court of the United States—for it was not that—but as in any other court having jurisdiction over the parties—assuming it did have such jurisdiction. Thus the fear that appellee would have had no forum within which to maintain its suit is not well-founded, since the trial court is the court of general jurisdiction for the Territory of Alaska. (48 U.S.C. 101.)

The trial court's disregard of its own status and its effort to make itself into a District Court of the United States, which it clearly was not, resulted in its application to this case, to appellants' extreme prejudice, of rules concerning jurisdiction, service and agency which should never have been applied here.

B. AS A RESULT OF MISCONCEIVING ITS STATUS, THE TRIAL COURT COMMITTED ERROR PREJUDICIAL TO APPELLANTS CONCERNING MATTERS OF JURISDICTION, SERVICE AND AGENCY.

The foregoing has demonstrated, we think, beyond any question that the trial court is not a District Court of the United States. The trial court's error in this regard was not a mere abstract or academic one but resulted in serious prejudice to the appellants.

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[34] *Rogosich v. Union Drydock & Repair Co.*, 67 F.2d 377 (3 Cir., 1933).

[35] *Pacific SS Co. v. Peterson*, 278 U.S. 130 (1928).

[36] 50 U.S.C.A. App. 925(c), *et seq.*

Since the trial court was not a District Court of the United States, it is clear that the limitations and provisions of Sec. 301 of the Act were not applicable to this cause. This conclusion is impelled by a reading of Sec. 303(b), which provides that suits under Sec. 303(a) may be maintained either in the District Courts of the United States or in any other court having jurisdiction of the parties. It is only in connection with the first group of courts—i.e., District Courts of the United States—that the statute makes the limitations and provisions of Sec. 301 applicable.[37]

The limitations and provisions we discuss directly below. In effect, they gave "District Courts of the United States" broader jurisdiction over non-resident labor unions, made service of the process of such courts upon non-resident unions easier, and authorized broader concepts of agency in such courts, than would otherwise obtain. But since the trial court was not such a court, it had jurisdiction over the International only by virtue of either the common law or the statutory law of Alaska. Similarly, if service was properly effected upon the International, it was so effected only by virtue of the common law or the statutory law of Alaska. And finally, the agency relationships between the International and Local 16, and between the alleged officers of these organizations and their alleged principals, had to be determined by the common law or the statutory law of Alaska.

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[37]Sec. 303(b) reads:

"* * * *in any District Court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount at controversy, or* in any court having jurisdiction of the parties * * *" (Italics supplied.)

In each instance, however, the trial court applied the provisions of Sec. 301 and in each instance those provisions were detrimental to the appellants. On each issue the common law or the Alaska law was more favorable to appellants.[38]

The limitations and provisions of Sec. 301 which the court applied are substantially as follows: Sec. 301(b) provides that a labor organization shall be bound by the acts of its agents, *and that it may be sued as an entity.* Sec. 301(c) provides that the District Courts of the United States shall have jurisdiction over labor organizations in the district in which *they maintain their principal office,* or in any district in which *their duly authorized agents* are engaged in representing employee members. Sec. 301(d) provides that the service of process upon an officer or *agent* shall constitute service upon the labor organization. Sec. 301(e) provides that in determining whether any person is acting as an agent, *the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

Even superficial examination of the provisions of Sec. 301 indicates how broadly they have extended the

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[38]That the extension of jurisdiction over non-resident associations, the greater ease of service thereon, and the broader scope of agency doctrine was limited by Congress to cases in United States District Courts and not extended to "other courts", gives appellee no cause for complaint. It may well be that Congress, recognizing that such extensions were novel and opened the door to grave abuses to the detriment of trade unions, decided that it did not want to permit the extended doctrines to be applied and administered by any but judges of the United States District Courts—judges in whose competence and ability Congress presumably had greater faith than it might have had in judges of "any other court", since it had more knowledge of those men than of other judges.

rules with respect to jurisdiction, service and agency. A comparison of those provisions with the common law or Alaska statutes on the subject demonstrates that in this particular case the error committed by the trial court was very significant.

1. As to jurisdiction.

As we have seen, the trial court assumed jurisdiction over the appellant International despite the fact that it maintained no office in Alaska and that its principal place of business was in California, upon the ground that it had an "International Representative" employed by it in Alaska who was there representing its employee members. This assumption of jurisdiction was clearly based upon Sec. 301(c) and upon nothing else. Since, as we have shown, Sec. 301(c) does not apply, the trial court had no jurisdiction over the International.

The attempt of the trial court to assert jurisdiction over the International which was (as to it) a nonresident, unincorporated association, raises serious constitutional questions as well as those already discussed. In *Flexner v. Farson,* 248 U.S. 289 (1919), the Supreme Court held that a Kentucky statute providing that jurisdiction could be obtained over a foreign partnership or association upon a cause of action arising from business done in the state, by serving the agent of such partnership or association residing in the state, was unconstitutional. The court found that the statute violated the due process clause. This case has been followed by the highest courts of a number of states, all of which invalidated similar

statutes in their own states.[39] The doctrine of the *Flexner* case has been qualified in later cases but the basis of the qualification lies in the nature of the business of the foreign partnership or association over whom jurisdiction is sought to be asserted. In *Doherty & Co. v. Goodman,* 294 U.S. 623 (1935), the Supreme Court upheld the constitutionality of an Iowa statute which provided that a non-resident association *conducting an office* in Iowa could be served by serving an agent employed in such office, *in all matters growing out of or connected with the business of that office,* provided that the business conducted was of a special nature *subject to special regulation by the state.*[40]

The principle which these cases establish is that at common law no foreign association could be subjected to the jurisdiction of a forum simply by service upon an agent doing business within the state. If a specific statute provides for such an assertion of jurisdiction, then such a statute will be upheld if the foreign association maintains an office in the state, if the cause of action arises out of the business of that office, and if

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[39] *Woodfin v. Curry,* 228 Ala. 436 (1934); *Andrew Bros. v. McClanchan,* 220 Ky. 504 (1927); *Victor Cornille etc. v. R. G. Dunn & Co.,* 153 La. 1078 (1923); *Knox Bros. v. Wagner & Co.,* 141 Tenn. 348 (1919).

[40] The qualifications which the Supreme Court insisted upon, and which are italicized above, are not present in this case. The International did not conduct an office in Alaska. The action did not grow out of, nor was it connected with, the business of any such office. And, query: Whether the conduct of a labor organization in interstate commerce is subject to special regulation by the Territory of Alaska. We shall point out immediately below that there in fact is no Alaska statute akin to the Iowa statute involved in the *Doherty* case.

the business in question is subject to special regulation by the state.

A thorough perusal of the three volumes of the Alaska Compiled Laws, Annotated (1948), reveals no statute of the territory which authorizes service upon a non-resident association.

As a matter of fact, there is a decision of the Alaska court[41] to the effect that under Alaska law an action cannot be maintained against a partnership as an entity under the Alaska statutes. This suggests that even as to resident unincorporated associations, an action cannot be maintained in Alaska. If that be true, then under the Alaska law, the trial court had no jurisdiction even over Local 16 as an entity.

Accordingly, as to the International, the judgment here must be reversed either because it can be stated at once that Alaska could not have acquired jurisdiction over the person of the International under the cases cited above, or as to both appellants, because the Alaska court failed to rule on whether or not under its law, jurisdiction could have been obtained over both appellants. Its reliance upon Sec. 301(c) in the place of its own law was clearly defective.

2. As to service.

Connected closely with the question just discussed is the question of service. Here, again, the trial court asserted its jurisdiction over the International and

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[41] *Burris v. Veterans Alaska Cooperative Co.*, D.C., Territory of Alaska, Division No. 1, unreported.

held that service was properly effected upon it by service upon its alleged "International Representative". The validity of this service was dependent solely upon the provisions of Sec. 301(d) and (e), and this reliance, as we have already pointed out, was not well founded.

In a case decided only several months ago, the United States District Court for the Eastern District of New York granted a motion to vacate service of summons upon an International Union with headquarters in Indiana. In that case process had been served upon the International's president while he was in New York. The organization had neither an officer nor a representative in New York, although there was in that jurisdiction a local of the International. In granting the motion to vacate, the court said:

> "It appears that the defendant's constitution and by-laws require that its principal office be located in Indianapolis, Indiana; that all of its books, records, etc. be kept there; that its funds be deposited in Indianapolis banks and that its officers reside there.
>
> "By reason of the foregoing I find that the defendant is not doing business in New York. Philadelphia and Reading Ry. Co. v. McKibin, 243 U.S. 264, 265; Danega Inc. v. Lincoln Furn. Mfg. Co. Inc., 29 F.2d 164; Amtorg Trading Corp. v. Standard Oil of California, 47 F. Supp. 466."
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> *Daily Review Corporation v. International Typographical Union,* E.D.N.Y. No. 10344, June 20, 1950 (26 L.R.R.M. 2503.)

In the case at bar the constitution of the International (Pl. Exh. 3) and the affidavits of Verne Albright (T.R. 8-14) and Germain Bulcke (T.R. 16-18) demonstrate that the International maintains its principal office and place of business in San Francisco, that all of its books, records, accounts and monies are kept there, and that none of its officers reside in Alaska. Thus the reasoning of the decision in the *International Typographers* case, *supra,* in which case the provisions of Sec. 301 were concededly applicable, compels a similar conclusion here where the broad provisions of Sec. 301 are not applicable. The International's motion to quash service should have been granted.

Since there was no jurisdiction over the International in the first instance, the service upon its alleged "International Representative" could not cure that defect and nothing is cited by the trial court in its opinion on the motion to quash service and on the demurrer (83 F.Supp. 224) which indicates that it is relying in this or any other respect upon Alaska law.

3. As to agency.

The error which the trial court fell into concerning the laws of agency stem, as do the other two errors discussed, from its misconception of its own status and consequently its unjustified application to this cause of the provisions of Sec. 301. The error is most pronounced in the instruction to the jury on the question of agency. (T.R. 49.) This instruction is framed entirely upon the theory of Sec. 301(e) and specifi-

cally informs the jury that the question of whether the specific acts performed were actually authorized or subsequently ratified is not controlling. Since the evidence fell far short of showing that the International either authorized or subsequently ratified the acts complained of, this instruction was highly prejudicial to the International.[42]

The ordinary rules of agency, of course, require either prior authorization or subsequent ratification. (*Restatement of Agency,* Secs. 1, 15, 26, 82, 140, 212, 215.) In the absence of either, the principal cannot be bound by the acts of his agent. The failure of the trial court to instruct on the theory of the ordinary rules of agency made the International responsible, in the eyes of the jury, for every act which occurred in Alaska, whether the International had any knowledge of it or not, and apart from either authorization or ratification by the International.[43]

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[42]Even if there was some evidence of participation by agents of the International, the question of whether this constituted "authorization" or "ratification" should have gone to the jury as a question of fact (Cf. *United Brotherhood etc. v. United States,* 330 U.S. 395 at 408-409 (1947)), under appropriate common law agency instructions. 2 *Am. Juris.* 349 *et seq.*, and cases there cited.

[43]The trial court was at least obligated to apply to this case the common law doctrine of agency discussed above, since its reliance on Sec. 301(e) was erroneous. It is arguable that the trial court was required to apply an even more stringent standard than the common law requires. Since the trial court, while not a "District Court of the United States" was probably at least a "court of the United States", the provisions of the Norris-LaGuardia Act (29 U.S.C.A. 101, *et seq.*) apply to it. (*Alesna v. Rice,* 69 F. Supp. 897 [1947], later dismissed on other grounds, 74 F. Supp. 865 [1947]; affirmed 172 F.2d 176 [1949]; cert. denied 338 U.S. 814 [1949].) If that is the case, then Sec. 6 of the Norris-LaGuardia Act (29 U.S.C.A. 106) requires that a labor organization shall not be held responsible for the acts of its agents "except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Cf. *United Brotherhood etc. v. United States, supra.*)

Since the trial court was not a "District Court of the United States", it erred in applying to this case the provisions of Sec. 301 of the Act. That error led it into an assumption of jurisdiction over the International which it did not have, into an assumption of jurisdiction over Local 16 which it probably did not have, into an acceptance of a purported service of the International which was not a valid service, and finally, into an application to the cause (in its instruction to the jury) of rules of agency which were not applicable and which were highly prejudicial to both the International and Local 16. For each of these reasons, the judgment below must be reversed.

III.

PREJUDICIAL ERROR TO APPELLANTS RESULTED FROM THE TRIAL COURT'S INSTRUCTIONS TO THE JURY.

The remaining portions of this Argument will be concerned with the errors which were committed by the trial court within the framework of its erroneous conception of the nature of appellee's cause of action and its status as a Court. From what follows it will be shown that these errors also require a reversal of the judgment.

(a) Specifications of error 3 (b), (d), (e) and (f).

The trial court charged the jury that before the appellee could recover, it was required to prove: (1) that the appellants, or either of them, engaged in, or

induced or encouraged appellee's employees at Juneau or the employees of other employers to engage in, a concerted refusal in the course of their employment to work on lumber of appellee, or to perform any services for appellee; (2) for the purpose of forcing and requiring the appellee to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned; (3) that such acts, or any of them, if committed by and as the officers or the agents of appellants, or either of them, were within the scope of employment of such officers or agents; and (4) that as a direct and proximate cause thereof, the appellee was damaged. (Instruction No. 5; T.R. 50-51.)

The trial Court presumably recognized that appellants, as labor organizations, could act only through their officers or agents. Hence, in Instructions Nos. 4, 6 and 7, as well as in Instruction No. 5, it charged the jury with the rules to be applied in determining who were agents of the appellants, and whether or not the activities of such agents were chargeable to them. Before these instructions are examined in detail, some discussion is necessary concerning the right of each appellant to be free from liability unless the essential elements of the cause of action were established against it individually.

The appellants here were separate labor organizations. The cases are clear that the relationship between them evidenced by their respective constitutions

(Pl. Exhs. 3 and 4) did not, without more, make Local 16 an agent of the International.

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922);

Daily Review Corp. v. I.T.U., 9 F.R.D. 295, (D.C. E.D. N.Y. 1949);

Isbrandtsen Co. v. National Marine Engineers Beneficial Ass'n, 9 F.R.D. 541 (D.C. S.D. N.Y. 1949).

Before either appellant could be held liable, the evidence had to establish that *its* agents engaged in the proscribed activities, and that the acts of such agents were binding upon *it*. It would not be sufficient, in order to hold the International, to show simply that Local 16, through its agents, had engaged in actionable conduct. Proof was required that the International, acting through *its* agents or officers, had committed the wrongful acts.

With this in mind, it becomes apparent that Instructions Nos. 6 and 7 of the trial court were prejudicial to the International. Instruction No. 4, while erroneous in a vital particular already discussed,[43a] gave the jury an otherwise accurate statement of the common law rules of agency.[43b] The court was correct

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[43a]This was the inclusion in the instruction of Sec. 301(e) of the Act, the error of which is discussed at pages 78-79, *supra*. Reference hereafter to Instruction No. 4 will connote a reference only to those portions of the instruction exclusive of the first paragraph.

[43b]Instruction No. 4 also instructed the jury that it was undisputed that the witness Verne Albright and John Barry were, during the time covered by the dispute, officers of the International. This instruction was contrary to the evidence, which established that Albright and Barry were employees, rather than officers of the International. (T.R. 272-274).

in this respect. Congress intended these rules to govern the responsibility of labor organizations for the acts of their agents, in cases under the Act.[44] The trial court, however, did not confine itself to this standard of responsibility. It proceeded, in Instruction No. 6, to give the jury a sweeping definition of conspiracy or joint action between Local 16 and the International upon which the jury could also rely in holding the International responsible. Its effect, as will be seen, was to direct a verdict against the International.

The appellee's case was tried on the theory that the International could not be found liable unless Local 16 was liable. (T.R. 1044-1045.) Its theory could hardly have been otherwise, for the record of events in Juneau showed clearly that the dispute was one between the appellee and Local 16 only. The responsi-

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[44]House Conference Report No. 510, on H.R. 3020, Statement of the Managers on the Part of the House, stated with respect to this question:

"(12) The conference agreement contains in the definition section a rule to be applied for the purpose of determining when a person is acting as an 'agent' of another person so as to make such other person responsible for his acts. A provision having the same effect was contained in section 12 of the House bill, under which the Norris-LaGuardia Act was made inapplicable in connection with certain activities dealt with in that section. One of the provisions of that act which was thus made inapplicable was section 6 thereof, which provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the 'unlawful' acts of its agents except upon clear proof of actual authorization of the particular acts performed, or subsequent ratification thereof after knowledge. Hence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)." (*Legislative History*, page 536.)

bility of the International for the conduct complained of by appellee depended primarily on the interpretation to be placed on the activities of one Verne Albright, who was concededly an employee of the International. (T.R. 272.) Albright first learned of the existence of the dispute between appellee and Local 16 early in May 1948 (T.R. 946), when he was called to Juneau by the Local to assist it in achieving a settlement. While in Juneau, he attended numerous conferences at which he acted as the spokesman for Local 16. (T.R. 948-951.) According to his testimony, his entire participation in the events which took place in Juneau was as a representative and spokesman for Local 16 alone. (T.R. 947.) His affidavit in support of the International's motion to quash service was introduced in evidence by appellee as its Exhibit 19. It stated, among other things, that each local of the International was an autonomous body having complete authority with respect to the commencement or cessation of labor disputes, that the International was not involved in the dispute in Juneau in any manner, and that his participation in the dispute was solely as a representative of Local 16, pursuant to its request. The question of whether Albright had acted solely as the agent of Local 16 in the dispute, or whether as an employee of the International his activities were also imputable to the latter, was thus a crucial issue in the case. It should have been decided by the jury on the basis of the ordinary principles of agency which were included in Instruction No. 4, and other instructions. By giving Instruction No. 6, however, the

trial court made the liability of the International depend not on whether Albright or others had acted as its agents, but on whether the agents of Local 16 had committed unlawful acts. For the instruction permitted the jury to find the International chargeable with the acts of agents of Local 16 by virtue of the mere presence of Albright in Juneau, without any regard whatever to the scope of his authority to bind the International while there. Under the instruction, if the jury found "from a preponderance of the evidence that" Albright and Local 16

> "* * * acted jointly or in pursuance of a common purpose or design, then from [that] time *everything that was done, said or written by any of the officers or agents of* [**Local 16** *or the International*] *in furtherance of such* * * * *understanding and to effect the object or purpose thereof, regardless of whether done, said or written in Alaska or elsewhere, is binding on both of the* [*appellants*] *just as though they themselves, through their officers or agents, had done such acts or made such statements, and if the object of the conspiracy was accomplished, resulting in damage, each is liable for the whole thereof regardless of the degree of participation in the commission of the acts charged, or any of them.*" (Instruction No. 6; T.R. 51-52. Italics supplied.)

Since the instruction also stated that "evidence [of] a combination of or cooperation between two or more persons to accomplish *a* common purpose" was "sufficient" to show a "common purpose or design" (italics supplied), the fact that Albright cooperated with the officers of Local 16 in the common purpose

of effecting a settlement of the dispute gave the jury no alternative but to find the International liable for all of the acts of the agents of Local 16.

Similarly, Instruction No. 7 was so broadly stated that Albright's assistance to Local 16 in settling the dispute could have been found by the jury to constitute the "aid" to the latter's acts which, standing alone, was sufficient under the instruction to impose liability on the International "to the same extent as if [it] had performed the act[s] [itself]". (T.R. 53.)

The effect of these instructions was to completely nullify Instruction No. 4 and to foist liability upon the International if the Local were liable, irrespective of its responsibility for the acts of the Local under agency principles. Furthermore, by the Court's supplementary instructions, the jury was directed to return a verdict against Local 16.[45]

It thus becomes evident that the effect of Instructions Nos. 6 and 7 was a directed verdict against the International as well.

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[45]Supplementary Instruction No. 2 stated in part as follows:
"The issues in this case are simple and few. You are instructed that it is uncontradicted that the members of Local 16 engaged in a concerted refusal in the course of their employment to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff and that this was for the purpose of forcing and requiring the plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons to whom said work had theretofore been assigned." (T.R. 1100.)
Supplementary Instruction No. 3 stated in part as follows:
"In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

A further evil of Instruction No. 6 lay in the fact that it was the first indication to either appellant that it was charged with a conspiracy. The complaint of appellee did not allege a conspiracy between appellants. At no time during the trial did appellee advance a theory that the International's liability was based on its alleged responsibility as a co-conspirator with Local 16 for the acts done by the latter's agents. At no point in the trial did the trial court mention the theory of a conspiracy between appellants, nor rely on such a theory to support any of his rulings on the admissibility of evidence. In short, appellant International was given no notice whatever that it was being accused of a conspiracy with Local 16 upon which its responsibility for the acts of the Local could be predicated until both sides had rested. It thus was effectively deprived of any opportunity to introduce evidence negating the existence of a conspiracy. The prejudice to the International of Instruction No. 6 was two-fold: first, it permitted the jury to consider a basis for the International's liability which was substantially broader than the agency theory of liability and was totally unwarranted under the provisions of the Act; and second, since it was given by the trial judge after all the evidence was in, it deprived the International of notice of and an opportunity to refute a basis for its liability which was substantially different from the agency theory.

The prejudice which resulted to the International from Instructions Nos. 6 and 7 is strikingly illustrated by applying them to the facts in the case of

Perry Norvell Co., 80 N.L.R.B. 225 (1948). In that case the Board was required to determine, among other issues, the responsibility of a national labor organization for unfair labor practices committed by a local union. The extent to which an official of the national union had participated in a strike of the local union is shown by the following excerpt from the Board's decision:

> "Hutchinson was the principal official of United active among the employees of the Company. He was in Huntington about half the time between August 19 and October 28, 1947, working with the employees of the Company. He addressed meetings of employees, including the two meetings at which the Committee was formed, gave advice as to publicity and other matters, was in and about the plant before and during the strike, and was frequently present at strike headquarters. There is no evidence to show that Hutchinson was responsible for the calling of the strike. On one occasion, however, he was heard urging the strikers 'to stick it out' until the company should be willing to see their Committee. Several times Hutchinson loaned the strikers sound equipment belonging to United. At one meeting of strikers, he brought in a motion picture projector and showed a film produced by United Electrical Workers, C.I.O. Hutchinson collected about $145 from the employees in another shoe factory and turned this money over to the Committee. He also brought up individuals who contributed funds to the Committee. None of this money came from United or any of its locals. United stipulated that, in all that he did, Hutch-

inson acted within his authority. The other officials of United, George Martin, Clifford Johnson, Norman Bartlett, and Julius Crane, also appeared to have been active among the strikers, but to a considerably lesser extent than Hutchinson." (80 N.L.R.B. 225, at 233; footnotes to the Board's decision omitted.)

Despite the stipulation of his principal that in all that he did, Hutchinson acted within his authority,[46] the Board, applying the common law rules of agency, held that the national union was not responsible. It stated:

"As to *United,* the record clearly shows that responsible direction and control of the strike remained in the Committee at all times; it does not show that United was a co-sponsor of the strike. Although employees who later became active Committeemen, including Randolph Johnson, the Committee chairman, initially sought the aid of United, at no time did United or its locals furnish financial assistance to the Committee. The record shows that advice given by United's representatives during the strike was furnished at the request of the strikers and of the Committee, which remained free to accept or to reject it. In addition, the record is barren of any evidence that any representative of United incited, committed, participated in, or even observed or knew of any of the acts of restraint or coercion which we have found were committed. Finally, the decision whether to continue or to end the strike rested at

[46]No such stipulation was made by the International with respect to the activities of Albright in this case.

all times with the Committee. We are of the opinion, therefore, that, under common-law rules of agency which the Board is required to apply, these facts establish, at best, a remote relationship between the Committee and United and do not lead to the conclusion that the Committee was an agent of United, or that United was a co-sponsor of the strike with the Committee." (*Ibid.*, at 247; footnotes to the Board's decision omitted.)

Had the responsibility of the national union in that case been tested by Instructions Nos. 6 and 7 of the trial Court here, there is no doubt that it would have been held liable.

The error committed by the trial Court in giving Instructions Nos. 6 and 7 was so fundamental that the judgment must be reversed irrespective of the presence in the record here of some evidence that the International might have been responsible. The error here was similar to the one committed by the trial court in *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395 (1947). The language of the Supreme Court in that case concerning the necessity for reversing the judgment because of such an error is equally applicable here:

"No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under § 6 of such association or organization for acts of its agents. * * * There is no way of knowing here whether the jury's verdict was based on facts within the condemned in-

> structions, * * * or on actual authorization or ratification of such acts, * * *" (330 U.S. 395, at 408-409.)
>
> "Our only point is this: Congress in § 6 has specified the standards by which the liability of employee and employer groups is to be determined. No matter how clear the evidence, they are entitled to have the jury instructed in accordance with the standards which Congress has prescribed." (*Ibid.*, at 410.)

The trial court made additional errors in the other instructions with which we are here concerned. In Supplementary Instruction No. 3 it removed from the jury's consideration the only issue which Supplementary Instruction No. 2 had left for it to decide with respect to Local 16. The latter instruction had directed the jury to find that the conduct of Local 16 was unlawful, and hence left for it to determine only whether damages proximately resulted therefrom. By the last paragraph of Supplementary Instruction No. 3 even this issue was removed from the jury. That paragraph provided:

> "In this case Local 16, by engaging in the concerted refusal aforesaid, ratified the previous acts of its officers and agents and, hence, there is no issue for you to decide as to Local 16." (T.R. 1101-1102.)

In Supplementary Instruction No. 4 the trial court distorted otherwise correct instructions concerning the scope of employment of agents by the following language:

> "Ordinarily the question whether a certain act is within the scope of employment of an agent of a

> labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. *Here the acts alleged are not of that kind.*" (T.R. 1102; italics supplied.)

This made the instruction prejudicial to the International, for the portion quoted was in effect a direction to the jury to find that everything done by Albright was within the scope of his employment as an International Representative of the International, and therefore bound the International. In the light of Albright's own testimony that he acted solely on behalf of Local 16 in the dispute, it removed from the jury the important question of whether Albright's employment by the International to act on behalf of its locals and at their request (T.R. 17-18) made his acts *on their behalf* acts of the International as well. It is clear that the similar question of whether an employee of a holding corporation bound that entity when he was employed by it to assist, and did assist, its subsidiary corporations at their request, would be for the jury to decide on general agency principles.[47] The court should have gone no further in this case.

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[47]Cf. the statement of Senator Taft in Congressional debate on the Act: "All this proviso does is to determine the question whether an agent of a labor union should have applied to him *the ordinary common law rule of agency.* Why a labor union should not be responsible for its agents, under the same rules of law that make a corporation responsible for its agents, I cannot understand. That is what this does." (93 Daily Cong. Rec. 6680, June 6, 1947; *Legislative History,* page 1599.) (Italics supplied.)

In summary, it can be stated that each of these errors in instructions standing alone was prejudicial to the appellants. Viewed together, they are even more aggravated and make a reversal of the judgment manifest.

(b) Specifications of error 3 (g) and (i).

The trial Court refused to give appellants' requested Instructions Nos. 1, 2, 12 and 13 to the jury. These instructions stated the public policy of the United States with respect to labor disputes as embodied in the Act,[18] as well as the purposes and policy of the Act itself.[19] By them appellants proposed to tender to the jury as an issue for its consideration the effect of the conduct of appellee on its right to recover damages. By refusing to give these instructions, the trial court ruled that the conduct of the appellee in the dispute could neither constitute a defense to the action against appellants, nor be considered in mitigation of damages.

It is submitted that this ruling of the trial Court was erroneous, and prejudiced both appellants. If the appellee's own wrong-doing caused the appellants' activities, the appellee had no right to recover. "No one may take advantage of his own wrong." (*In re F. P. Newport Corp.*, 98 F. (2d) 453 [9 Cir., 1938].)

The record shows that the appellee's own wrong-doing caused the acts of which it complained. Early in August, 1947, Eugene S. Hawkins, General Man-

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[18]Appellants' requested Instructions Nos. 12 and 13. (T.R. 43-44.)

[19]Appellants' requested Instructions Nos. 1 and 2. (T.R. 34-36.)

ager of appellee, had promised Albright that if Local 16 and Local M-271 reached an agreement concerning the work to be done for appellee by the longshoremen, the appellee would be perfectly agreeable to such an arrangement. (T.R. 181-182.) The appellee repudiated this commitment when it rejected, early in April, 1948, the adjustment which had been reached between the two locals. The cross-examination of Hawkins on the matter reads as follows:

"Q. Later on you had a number of meetings with representatives of Local 271 and Local 16 in which Local 271 asked you to turn that work over, namely the loading of the lumber, to Local 16; isn't that true?

A. Yes.

Q. And you still said that you couldn't do so because you had assigned that work to Local 271 which was now asking you to turn the work over to Local 16. Is that the position you took then?

A. Yes.

Q. At this time if your sole reason for not assigning this work to Local 16 was because you had turned it over to 271 and 271 asked you to turn it over to 16, your contention was no longer tenable; isn't that true?

A. Yes—that wasn't the sole and only reason that developed.

Q. You found another reason?

A. Another reason had been developed by that time.

Q. You never mentioned that reason either to representatives of 271 or of 16, did you?

A. I don't recall any specific instance; no."

(T.R. 238-239.)

The additional reason referred to by Hawkins was totally unrelated to the cost of appellee's operations. (T.R. 257.) It was described by Eugene H. Card, the appellee's Labor Relations Advisor (T.R. 297) as follows:

"Q. What is the Company's objection to hiring longshoremen to load barges?

* * * * * * *

A. Because we have an agreement with another union under which that work is covered. We can't break our agreement with the I.W.A. and take the work away from them and give it to somebody else just because they come along and ask for it." (T.R. 306.)

"Q. Did you have any objection to making two contracts, with two organizations?

A. Yes, of course.

Q. What were the reasons for it?

A. You can't take work away from one group of men and give it to somebody else.

* * * * * * *

Q. If you took the work away—did it make any difference to you who did the work? Who did you want to do the work?

Mr. Andersen. That is a complex question.

Q. Did it make any difference to the company?

A. It made a difference in this respect; yes. We couldn't permit the I.W.A. to violate their agreement any more than they would permit us to violate ours.

Q. Of course people can call off an agreement if they want to?

A. Yes.

Mr. Andersen. I object.

Q. Why were you unwilling to void the agreement with the I.W.A. and draw up another excluding barge work?

A. If we had let the agreement go then and sign with the longshoremen, the next day some other union would be down and say, 'We want an agreement covering machinists,' or, 'We want an agreement covering painters,' or, 'We want an agreement covering carpenters.' We weren't just going to open road to everyone in the Territory coming in and covering small groups of people.

Q. Was there any other reason you can think of now?

A. None that I know of; no." (T.R. 309-310.)

The refusal of appellee to live up to its word was totally uncompromising. Leonard Evans, the Alaska representative of the United States Department of Labor (T.R. 985), who had been assigned to attempt to conciliate the dispute (T.R. 986), was informed by Hawkins that the appellee would close the plant down rather than deal with the longshoremen. (T.R. 988-989.) This unyielding attitude of the appellee put an end to negotiations which quickly could have settled the entire dispute. The testimony of Evans reveals the following:

"A. * * * I tried to get a meeting of the representatives of the sawmill, representatives of the Company and representatives of the Longshoremen.

Q. Were you successful in getting Mr. Hawkins to agree to such a conference?

A. Either then or later I was successful in getting the three parties to meet for a very short time in the Commissioner of Labor's office.

Q. When was that?

A. If I remember right, it was a Friday afternoon.

Q. About when?

A. In the same week.

Q. Were your conciliations successful then or unsuccessful?

A. When we left I was hopeful. We had scheduled a second meeting for the following Monday. All three parties at that time indicated they would all show up. On Monday the Company representatives didn't show up. When I phoned to remind them they said 'No soap—no meeting.'

Q. That is, they refused to meet, did they?

A. Yes." (T.R. 990-991.)

In addition, the record was uncontradicted that the appellee knew that if it had kept the commitment it had made to observe the understanding reached between Local 16 and Local M-271, the mill would have continued to operate. Hawkins testified as follows on cross-examination:

"Q. And from that point on all they requested was that you turn the work over to them from the bull rail out; that is correct, isn't it?

A. From the bull rail out; yes.

Q. But of course you insisted that the I.W.A. continue to do the work; isn't that correct?

A. Yes.

Q. And despite the fact that four men would only be used part time, you shut down the mill rather than hire these two or four longshoremen; is that true?

A. No.

Q. You didn't give the work to the longshoremen?

A. We didn't shut down the mill——

Q. You didn't give the work to the longshoremen?

A. No.

Q. You knew, if you gave the work to the longshoremen, all the men would return to work and the mill would function at full blast, didn't you?

A. Yes, I presume." (T.R. 270-271.)

In the light of the public policy of the Act with respect to the settlement of labor disputes, the jury should have been permitted to consider this breach by the appellee of its previous commitment and its uncompromising refusal to negotiate a settlement. It might well have concluded that the appellee's own wrongdoing, under the terms of the very statute upon which it relied for relief, should defeat its right to recover, or at the very least, diminish the damages to which it otherwise might be entitled.

Since appellee's cause of action was a statutory tort, the rule of diminution of damages was applicable. That rule is given by the *Restatement of Torts* as follows:

"Sec. 918. Avoidable Consequences.

"(1) Except as stated in Subsection (2), a person injured by the tort of another is not entitled to recover damages for such harm as he could have avoided by the use of due care after the commission of the tort.

"(2) A person is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended such harm or adverted to it and was recklessly disregardful of it, unless the injured person with knowledge of

> the danger of such harm intentionally or heedlessly failed to protect his own interests."

By substituting the statutory duty of the appellee (to bargain in good faith and to utilize fully the Conciliation Service of the Federal Government), for the "due care" referred to in the Restatement section, the requested instructions would have submitted the Restatement rule to the jury. Further, irrespective of the statutory policy, the appellee's duty to mitigate damages might well have included an obligation to comply with the request of Local 16 and Local M-271 concerning its barge loading, and thus prevent the closing of its mill, pending a final settlement of the dispute. An analogous situation occurred in *Alcoa Steamship Co. v. Conerford,* 25 L.R.R.M. 2199 (D.C. S.D. N.Y. 1949). There, stevedoring and steamship companies sued local unions of longshoremen[49a] for breach of contract, under the provisions of Sec. 301 of the Act.[50] The breach consisted of the refusal of the longshoremen's unions to furnish gangs of men to load or unload vessels unless the number of men to be employed in the hold of each vessel was restricted to eight. The court's opinion was concerned solely with the question of the amount of

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[49a]The defendants there were affiliated with the International Longshoremen's Ass'n (AFL) with which appellants have no connection.

[50]The pertinent portion of Sec. 301 reads as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U.S.C. Supp. (1949), Sec. 185.)

damages to which the various plaintiffs were entitled, it being conceded that the collective bargaining contract had been breached. In considering the specified damages claimed by one plaintiff to have arisen from a six-day work stoppage by the longshoremen, the court stated:

> "It can be seen that Cunard did not follow the practice of the Cuba Mail Co. and permit the loading of the ships with eight men in the hold once it became clear that no longshoremen would work if more than eight were demanded. Instead, it allowed six days to elapse in which no work was done. This upset the carrier's schedules and caused the damages to mount. Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc., 265 Fed. 397, E.D. La. 1920, is authority for the proposition that in such a situation the steamship company is under a duty to mitigate damages. I find that it was not unreasonable for Cunard Limited to wait until August 22, 1947, before undertaking the loading of the SS. Port Melbourne and the SS. Sibley Park in an effort to induce Local 791 to comply with the contract. But in view of the known imminent arrival of the SS. Media it was unreasonable to delay past that date, because to do so would have jeopardized Cunard's chances of adhering to its shipping schedule. On the evidence, it appears that Local 791 would have been willing to load the SS. Port Melbourne and the SS. Sibley Park with eight men in the hold starting August 22, 1947, and that the work could have been completed and the ships removed by the time the SS. Media arrived on August 27, 1947. For this reason the claims for rerouting the SS. Media cannot be allowed,

> nor can the claims incident to meat which had spoiled before loading on the SS. Port Melbourne. Of the remainder, one-third will be allowed since delay for two of the six days has been found to have been reasonable. This figure is $5,156.35." (25 L.R.R.M. at 2201.)

The case of *Nederlandsch Amer. S.M. v. Stevedores' and L.B. Soc.*, 265 F. 397 (D.C. E.D. La., 1920), which was relied on above, also involved an attempt to recover for breach of a collective bargaining agreement. The members of the defendant longshoremen's union[50a] there involved had declined to work for plaintiff at the wages specified in a collective bargaining contract, and had struck for higher wages. The plaintiff sought damages based on demurrage which accrued while its ship lay unloaded because of the strike. The court stated:

> "This brings up the question of damages. Undoubtedly the ship was delayed and demurrage accrued; but this might have been avoided by paying the extra wages demanded. The recovery should be confined to what it would have cost for additional wages to unload the ship at the rate demanded." (265 F. 397, at 400.)

In the light of these authorities, as well as the uncontradicted evidence in the record that appellee had repudiated its own commitment and failed to observe the public policy of the Act, it is clear that the jury was entitled to consider the issues included in appellants' requested Instructions Nos. 1, 2, 12 and 13.

[50a]The defendant there was an independent union, with which appellants have no connection.

Had it done so, its verdict might have been for appellants, or for a lesser amount.

(c) Specification of error 3 (j).

The only remaining error in instructions to be discussed under this portion of the Argument[51] is the trial court's failure to comply with appellants' request that the provisions of Sec. 8(c) of the Labor Relations Act be embodied in an instruction to the jury. That section provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

The trial court did not define for the jury the meaning of the terms "induce" or "encourage", which appear in its Instructions Nos. 2, 3, 5 and 6, and its Supplementary Instruction No. 2. The expression by one person to another of views, argument, or opinion on any issue certainly constitutes an inducement to action and comes within the ordinary meaning of the terms "induce" or "encourage".[52]

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[51]The two other instructions included in appellants' Specification of Errors are integrally related to the trial court's ruling on a matter of evidence, and hence are discussed below, page 105, in the section of the Argument concerned with the trial court's rulings on evidence.

[52]Cf. the opinion of Rutledge, J., in *Thomas v. Collins,* 323 U.S. 516 (1945): " 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." (323 U.S. 516, at 537.)

The instructions given by the trial court, not limited by the provisions of Sec. 8(c), permitted the jury to find that the International had "induced" or "encouraged" within the meaning of the Act, simply if it had expressed views, argument or opinion on the dispute in Juneau to any other labor organization. This would be the case even though such expressions contained no threat of reprisal or force or promise of benefit. Under the unfair labor practice provisions of the Labor Relations Act, however, such expressions would not be actionable.

It would be redundant to repeat here the arguments already fully discussed under Part I hereof, *supra,* at pp. 35-37, which prove that the provisions of Sec. 8(c) are limitations on Sec. 303(a)(4) as well as on Sec. 8(b)(4)(D). The trial court, therefore, erred in failing to give the instruction requested by appellants which would have so limited Sec. 303(a)(4). That this error resulted in prejudice to the International can be easily demonstrated.

Appellants' Exhibit 24 was a portion of an article which had appeared in the "Dispatcher", the official publication of the International. (T.R. 973.) It contained the following statement:

> "I.L.W.U. Second Vice-President Germain Bulcke has informed all Canadian I.L.W.U. locals that Juneau Spruce Mill products are unfair." (T.R. 978.)

Under the instructions given the jury, not limited by the provisions of Sec. 8(c), the jury was required to find that the International by so informing its

Canadian locals had induced or encouraged the employees of other employers to refuse to handle products of the appellee. Yet, in the case of *Grauman Co.*, 87 NLRB No. 136 (1949), the National Labor Relations Board held that a similar "unfair" designation did not constitute the inducement and encouragement which was prohibited by the Labor Relations Act. A reading of the *Grauman* case together with the case of *Osterink Construction Co.*, 82 NLRB 228 (1949), which it overruled, indicates that the ruling concerning "unfair" lists in the *Grauman* case was based on the limitations contained in the provisions of Sec. 8(c). The refusal of the court to give this requested instruction of the appellants thus prejudiced the International on the question of its responsibility for the refusal of the longshoremen at Prince Rupert, British Columbia, to handle appellee's lumber at that port. (T.R. 619.)

IV.

PREJUDICIAL ERROR TO APPELLANTS RESULTED FROM THE TRIAL COURT'S RULINGS ON EVIDENCE.

(a) Specification of error 4 (a).

Over the objections of appellants, the trial court permitted the introduction of hearsay testimony that the appellee was unable to ship its lumber to Seattle or Tacoma because it was unable to have its barges unloaded at these ports. (T.R. 692-695.) This inability to ship was advanced as the reason for the closing of appellee's mill on October 11, 1948. (T.R. 696.) The trial court recognized the duty of appellee to

mitigate damages in ruling on an objection to the admission of other evidence. (T.R. 719.) The question of whether the appellee was in fact foreclosed from shipping to these ports and hence required to close its mill was material to the jury's consideration of whether appellee had taken all reasonable steps to reduce its losses.

An examination of the pertinent excerpt from the record (T.R. 692-695) reveals that the information upon which the witness Schultz relied to testify that the ports of Seattle and Tacoma were closed to appellee was based on investigations made by others. (See *supra,* pages 30-33.) This testimony was clearly hearsay, since the extra-judicial declarations of others were offered to prove the truth of such declarations, and none of such declarants were available for cross-examination by the appellants. Had the testimony been stricken, as it should have been, the jury might have concluded that the appellee was not compelled to close its mill on October 11, 1948, because of the activities of Local 16, but had done so to make essential improvements and alterations in its production system, and to remove "bottlenecks" which had been placed there by Hawkins, the former General Manager. (T.R. 448-450, 696-697.) In that event, the size of its verdict would have been substantially affected. The introduction of the testimony in question was therefore prejudicial to appellants.

(b) Specifications of error 3 (c) and (h) and 4 (b).

Appellants' Exhibit C established the existence of a contract between Local 16 and the appellee's prede-

cessor under which the latter agreed to employ persons represented by Local 16 to perform its longshore work. (T.R. 662-663.) The trial court held as a matter of law that this contract was not binding on the appellee, and so instructed the jury. (Instruction No. 11, *supra,* page 20.) It admitted the contract in evidence for the limited purpose of showing that such a contract existed between Local 16 and appellee's predecessor. (T.R. 927-930.) It refused appellants' requested instruction which would have submitted the question of the existence of a contract between appellee and Local 16 to the jury. (Requested Instruction No. 11; T.R. 41-42.)

Counsel for appellee conceded at the trial that the existence of a contract between Local 16 and the appellee, under which the latter had agreed to hire longshoremen for particular work, would have materially affected the legality of the efforts of Local 16 to enforce the rights of its members to such work. (T.R. 654.) Had the court submitted the question of the existence of such a contract to the jury, it would have been required, under appellee's own concession, to give it further instructions defining the effect of such a contract upon the rights of Local 16 to engage in the activities with which it was charged. Since the court erred in removing this question from the jury, the appellants were denied the benefit of further instructions limiting their liability, and were thereby prejudiced.

Among other things, appellants sought to show that such a contract between Local 16 and the appellee

could be implied from the course of conduct between them. (T.R. 925.) The evidence to support such an implied contract included the following: (1) The appellee never informed Local 16 that it repudiated the latter's contract with the appellee's predecessor. (T.R. 942.) (2) After the take-over, it continued to hire longshoremen in the same manner and for the same work as had its predecessor. (T.R. 933, 667-668.) (3) It instituted a wage increase for the longshoremen it hired at the same time that such an increase was negotiated by Local 16 with other employers of longshore labor in Juneau. (T.R. 932.) (4) No discussions were held from which could be implied an intention on the part of appellee to change the relationship which had existed between its predecessor and Local 16. (T.R. 667-668.)

It is submitted that these facts neither negate nor affirm the existence of an implied contract between appellee and Local 16 as a matter of law. Whether the mutual assent necessary to the formation of a contract could be implied from the foregoing conduct of the parties was a question of fact for the jury to decide.

Howell v. Grocers Inc., 2 F.2d 499 (6 Cir., 1924);

Martin v. Campanario, 156 F.2d 127 (2 Cir., 1946), cert. denied 329 U.S. 759 (1946).

The court's failure to submit the question to the jury prejudicially deprived appellants of a defense to which they were entitled.

CONCLUSION.

When the foregoing Argument is reviewed as a whole, it becomes plain that the judgment of the trial court was based on fundamental error committed at the threshold of the case. It has further been demonstrated that additional basic errors were committed within the erroneous framework upon which the decision of the court on appellants' demurrer left the case to be tried. In view of the nature of these errors and the prejudice which resulted to appellants therefrom, it is respectfully submitted that the judgment below should be reversed.

Dated, San Francisco, California,
September 22, 1950.

Respectfully submitted,
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GEORGE R. ANDERSEN,
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(Appendix Follows.)

Appendix.

Appendix

JURISDICTION.

Section 303 of the Labor-Management Relations Act, 1947, provides:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the

provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." (29 U.S.C. Supp. [1949] Sec. 187.)

Section 1291, 28 U.S.C. provides:

"Final Decisions of District Courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Terri-

tory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1294 (2), 28 U.S.C. provides:

"Circuits in which Decisions Reviewable. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: * * *

* * * (2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit;"

No. 12,527

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,

Appellants,

v.

JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

BRIEF OF APPELLEE

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JUNEAU SPRUCE CORPORATION (a corporation),

Appellee.

BRIEF OF APPELLEE

ANSWER TO JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement contains one misleading statement. The first pleading on behalf of appellants was a general demurrer filed November 20, 1948 (Tr. 15). The special appearance and motion to quash service of summons was not filed until January 3, 1949. The printed record does not disclose the date of filing of the motion to quash, although it does reveal that the affidavit in support of the motion was sworn to on December 27, 1948, over a month after the demurrer was filed (Tr. 14). The motion was filed before the court had ruled on the demurrer, and both motion and demurrer were overruled by the same order (Tr. 21, 22).

ANSWER TO APPELLANTS' STATEMENT OF THE CASE

Appellants' statement of the case seems designed to convey the impression that the issue litigated was whether the longshoremen were entitled to the work of loading appellee's barges. At least, some of the assertions concerning the evidence in the case appear to have no purpose except to imply that the longshoremen were rightfully entitled to the work and that appellee acted in an arbitrary manner in refusing their demands. In the interest of accuracy we have taken issue with appellants as to what the evidence was in this regard. We wish to emphasize, however, that these were immaterial matters. There was no issue at the trial as to which union organization was entitled to the work in question, for it was conceded that appellee had assigned the work to its regular sawmill employees and that appellants had not been certified by the National Labor Relations Board as the bargaining representative of appellee's employees. This satisfied the statute's requirements concerning the right to the work.

Appellants' statement of the case contains numerous inaccurate and misleading statements. On page 7 of appellants' brief it is stated:

> "Certain of the evidence at the trial was conflicting, but since the verdict of the jury was in favor of the appellee, all such conflicts are resolved in favor of the appellee in the following summary."

Appellants then set forth a purported statement of facts which is not only erroneous and incomplete in many

respects, but actually resolves questions of fact in favor of the appellants. In order to set this case in proper perspective for the consideration of the various errors assigned, we deem it desirable to set forth a correct statement of the facts which were conceded or which the jury might have found from the evidence.

Early in 1947 appellee purchased from Juneau Lumber Mills, Inc., a sawmill and other properties in Alaska, and on May 2, 1947, commenced operation of the sawmill at Juneau, Alaska. During the early stages of its operation the bulk of its sales were made to the Army Engineers, which took delivery of the lumber at appellee's dock. Other deliveries were made to commercial steamers, and a small amount to fishing boats and cannery tenders.

In September, 1947, the Army Engineers canceled its contract (Tr. 183). Appellee then acquired barges and tug boats for the purpose of shipping its lumber to ports in the United States and Canada (Tr. 184). The barges were also to serve as auxiliary storage yards made necessary by the limited storage capacity at the millsite (Tr. 187). Appellants' statement on page 9 of its brief that appellee used longshoremen to load lumber on its vessels is not borne out by the record. It was the uniform policy of appellee from the outset to use its regular sawmill employees exclusively in the loading of all company-owned equipment (Tr. 176-179). It was hardly feasible to do otherwise in loading barges since the work was intermittent and an integral part of the sawmill operations (Tr. 186, 254, 255).

At the time appellee purchased the properties in Alaska, it assumed no collective bargaining or labor agreements of its predecessor (Plaintiff's Ex. 1, Tr. 117). The employees at the sawmill were, for the most part, members of Local M-271 of International Woodworkers of America (hereinafter referred to as I. W. A.). Shortly after the commencement of operations I. W. A. requested the appellee to negotiate a contract with it (Tr. 125). When I. W. A. had established to the satisfaction of appellee that it represented a majority of the workers, appellee agreed to recognize it as the exclusive bargaining representative and commenced talks looking toward the execution of a contract (Tr. 129, 130, 144). The contract was finally executed on November 3, 1947, and included all employees of the company, regardless of the work they were doing, with certain exceptions not material here (Tr. 130, 302, Plaintiff's Ex. 2). It was expressly agreed that the I. W. A. recognition clause in the contract included all yard employees, when loading barges as well as when performing yard work (Tr. 302, 303), and that the sawmill workers would load everything, including barges, where appellee's equipment was used (Tr. 302, 303, 357). This agreement was made after I. W. A. officials had conferred with their International and had received an opinion that they were entitled to include such work (Tr. 349, 551, Plaintiff's Exs. 8 and 9).

On several occasions prior to the execution of the contract with I. W. A., representatives of both appellants requested that appellee negotiate with them coast wise and local contracts under which longshoremen

would perform various work, including the loading of barges (Tr. 150-159, 161-165, 183, 188, 192, 574). They admitted, however, that they did not represent any of appellee's employees (Tr. 192, 298). They were told that appellee had recognized I. W. A. as the exclusive bargaining representative for all of its employees (Tr. 160, 189) and that it would not sign a contract with any other union (Tr. 299).

The first barge load of lumber was loaded by appellee's sawmill workers and shipped in October, 1947. Although threats were made by the longshoremen that this barge would not be unloaded (Tr. 221, 299), it was in fact unloaded without incident. The mill was closed during the winter months of 1947-1948, but in March, 1948, appellee commenced the loading of another barge (Tr. 202). At this time representatives of Local 16 called upon appellee and again demanded the work of loading the barges (Tr. 201, 202). When this request was refused, representatives of Local 16 presented its claim to the work to a meeting of I. W. A. (Tr. 391). Local 16 announced its intention of establishing a picket line at appellee's plant if it could not get the barge loading, and asked the sawmill workers to respect the picket line (Tr. 396, 397). By means of false representations Local 16 prevailed upon the sawmill workers to agree to give up the barge loading and respect the picket line "until more could be found out about the situation" (Tr. 393-397, 414).

The barge loading was a comparatively small part of the work and the jobs of about 265 men were at stake (Tr. 267). The members of I. W. A. agreed to relinquish

the barge loading because they feared the mill would be shut down and they would lose their jobs (Tr. 484); because they wished to avoid trouble (Tr. 849); because they feared violence if they should go through the picket line threatened by the longshoremen (Tr. 873); because they feared the effect of being blacklisted (Tr. 848); and because they were deceived by appellants into the belief that the longshoremen were also employees of appellee and entitled to the work (Tr. 407).

When appellee refused to accede to the demands of the longshoremen, a picket line was established at appellee's plant on April 10, 1948. Appellee's employees refused to cross the picket line, as the result of which refusal the mill was forced to shut down until July 19, 1948 (Tr. 310).

During the interim repeated and continuing efforts were made to induce the longshoremen to remove the pickets and permit the mill to operate. The Mayor of Juneau appointed a fact-finding committee to investigate and attempt to resolve the dispute (Tr. 964). A representative of appellant I. L. W. U., Mr. Albright, attacked the Mayor's recommendation as "an employer inspired publicity dodge" (Pl. Ex. 17, Tr. 781). It was proposed that the dispute be submitted to the National C. I. O. Council, but this suggestion was rejected by Mr. Albright (Tr. 426). An officer of the I. W. A. International and a representative of the United States Mediation and Conciliation Service came to Juneau to attempt a settlement (Tr. 417, 418). A proposal was made to them by appellee which might have resolved the dispute, but at the last moment it was rejected by Mr.

Albright on orders from the San Francisco headquarters of I. L. W. U., because it was felt that the settlement might establish a bad precedent for the longshoremen (Pl. Ex. 6, Tr. 419-426). Throughout the period appellants maintained a pretense of desiring to "negotiate", but they meant by use of that term nothing short of capitulation to their demands (Tr. 525-528).

During the time the mill was closed Mr. Albright, the I. L. W. U. International representative for Alaska, acted as spokesman for the Longshoremen (Tr. 432). He spoke at meetings of appellee's employees, urging them not to cross the picket line, advising them that if they did so they would be blackballed and that in any event their jobs would be temporary because the company would be unable to unload its lumber (Tr. 444).

The sawmill workers were anxious to return to work, but were uncertain whether they should do so (Tr. 539, 541). They discovered that the representations made by appellants to induce them to relinquish the barge loading and to respect the picket line were in fact false (Tr. 414). Accordingly, about July 2, 1948, the members of I. W. A. voted to return to work and to claim the right to load the barges (Tr. 438, 441). This was not, as stated in appellants' brief, page 12, the first claim which I. W. A. made to the work. It was a reaffirmance of the original position of I. W. A. (Tr. 302, 303, 352, 349, 551, Pl. Exs. 8 and 9).

The mill reopened on July 19, 1948, with a small crew, but the picketing and other activities of appellants continued. Mr. Albright thereupon branded the sawmill

workers who had returned to work as strike breakers (Tr. 958-962, 780, 781, Plaintiff's Exs. 18 and 23). Germain Bulcke, vice president of appellant I. L. W. U., notified all Canadian locals of I. L. W. U. that Juneau Spruce products were unfair and this information was publicized in the official I. L. W. U. newspaper (Plaintiff's Ex. 24, Tr. 973-978). Longshoremen refused to load any of appellee's products on commercial steamers (Tr. 285, 294).

In August, 1948, a barge was loaded with lumber by the mill workers and departed for Prince Rupert. Threats were made that the barge would be followed (Tr. 763). Mr. Albright and a representative of Local 16 were in Prince Rupert when the barge arrived (Tr. 787, 788). The longshoremen in Prince Rupert refused to unload the barge, acting upon orders from John Berry, International representative of I. L. W. U. for British Columbia, who, in turn, was acting on orders from I. L. W. U. headquarters in San Francisco (Tr. 620-627). Appellee then succeeded in getting the barge unloaded at Tacoma, which was one of the few Pacific Coast ports not controlled by I. L. W. U. (Tr. 687, 274). But when appellee sent a second barge load of lumber to Tacoma in September, 1948, it discovered that even this port was closed to it. The barge remained in Tacoma and was not unloaded until during the course of the trial over six months later (Tr. 437, 438, 687).

As a result of its inability to market any of its lumber, appellee exhausted its storage space and was again forced to close the sawmill on October 11, 1948 (Tr. 696), and was still shut down at the time of trial.

In October or November, 1948, representatives of both appellants called on appellee, and stated that they wished to negotiate (Tr. 703, 730). The manager of appellee informed appellants that if they could agree with I. W. A. on some practical basis, he would recommend to appellee that it be accepted (Tr. 705). This proposal fell through because when appellants met with I. W. A. they increased their demands to include not only the actual barge loading, but also the sling men on the dock (Tr. 544-548).

At the time of trial, despite a ruling by the National Labor Relations Board that appellants were not entitled to the work in question (82 N.L.R.B. 650), the unlawful activities of appellants still continued. The members of Local 16 continued their picketing at appellee's plant (Tr. 411), and on May 2, 1949, while the trial was in progress, John Berry, acting on orders received from I. L. W. U. headquarters at San Francisco, again refused to permit lumber to be unloaded at Prince Rupert (Tr. 626).

The unlawful activities of appellants in seeking to force appellee to displace a small portion of its I. W. A.-represented employees for the benefit of appellants' members, caused damage to appellee in excess of $1,000,000 (Tr. 742, 759; Plaintiff's Ex. 14, 15). These figures did not take into consideration other items of substantial damage, such as loss of markets, decreased retail business, and deterioration in lumber and log stocks (Tr. 717, 718, 758).

I.

THE ONLY PREREQUISITE TO A CAUSE OF ACTION UNDER SECTION 303(b) IS THE COMMISSION OF THE ACTS CHARGED

Reduced to its essence appellants' contention in the corresponding section of their brief is that it would be awkward to have the National Labor Relations Board hearing a "jurisdictional dispute" under the National Labor Relations Act procedure while simultaneously a court was hearing an action for damages on the same facts and against the same union under Section 303 of the Labor-Management Relations Act, 1947. In such a situation, appellants reason, the Board might reach one result, the court another. Therefore, say appellants, a damage action for injury caused by a jurisdictional dispute cannot be heard by the courts until the Board has arbitrated the contentions of the union involved and has found adversely to it.

To reach the substance of appellants' misunderstanding of the Act, embodied in this contention, brevity will ultimately be served by a short statement of the structure of the Labor-Management Relations Act, 1947 (Act of June 23, 1947, 61 Stat. 136, 29 U.S.C.A. § 141 et seq., P. L. 101, 80 Cong., 1 Sess.).[1]

At the time of enactment of this statute the National Labor Relations Act, known as and hereinafter called

[1]Like appellants, appellee believes the most satisfactory reference to the history of the Labor-Management Relations Act, 1947, to be the two-volume "Legislative History of the Labor-Management Relations Act, 1947" published by the N.L.R.B. All references in this brief entitled "..... Leg. Hist....." will refer to this work.

the "Wagner Act", had been in effect some twelve years. It in substance guaranteed to labor the right to organize freely for collective bargaining purposes, and provided the machinery for the exercise of that right and punishment for its denial, all through an instrumentality of the United States with preferential access to the enforcement processes of the courts. That agency was the National Labor Relations Board, also referred to here as the "Board."

Conceiving that both the Wagner Act and its administration were fundamentally faulty, and that experience had demonstrated a need for elimination of certain practices, Congress extensively amended the Wagner Act, retaining in the amendment that Act's guarantees, machinery, and enforcement powers, and adding certain duties and restraints upon the exercise of such rights. The Wagner Act revision comprises Title I of the Labor-Management Relations Act, 1947, above cited and hereafter referred to as the "Act."

In thus legislating on labor affairs, Congress also added some new statute law, but instead of electing to proceed by separate bills, one for each subject, as was urged by some members of the Senate Committee on Labor and Public Welfare[2] it simply made under one bill separate titles of each of the new subjects.

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[2]From Senator Thomas' Separate Report on S. 1126 (1 Leg. Hist. 455):

"It would make better sense not to lump unrelated subjects into one omnibus bill . . .

"I believe the majority party acted unwisely in not following my suggestion of several bills for several subjects . . ."

Senator Morse on the floor (2 Leg. Hist. 1507):

"I deeply regret that the Senate did not see fit to proceed with labor legislation one issue at a time, by way of one title at a time; . . ."

Title II stated the Federal policy, and provided new Federal machinery, for peaceful settlement of the economic disputes which sometimes arises after the parties have reached the bargaining table and have there acted in good faith, all in compliance with the commands of the Wagner Act. Title III deals with practices in the general field of labor deemed injurious, wholly apart from organization and bargaining procedures, and prohibits them: government employees may not strike; certain payments may not be made to unions by employers; political contributions may not be made from union funds; and unions engaging in jurisdictional strikes and secondary boycotts, as defined in the Wagner Act, may be required to answer in damages to anyone injured thereby. And lastly, Title IV provided that a joint Congressional committee be created to study the problems of labor relations and productivity as a continuing inquiry into an ever-changing field. (Title V simply provides definitions for terms used in Titles II, III and IV, and the "separability clause.")

Of all the activities of organized labor which had caused concern, however, two were singled out by Congress for special attention: secondary boycotts and jurisdictional disputes. These attempts to settle interunion conflicts by economic force had aroused public resentment and judicial condemnation: denied the aid of both the Board and the courts[3] the public, employers, and employee hostages had stood helplessly by while such conflicts had mounted in numbers. Enforcement of

[3] *U. S. v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 819; N.L.R.B. v. *Gluek Brewing Company*, 144 F. (2) 847.

union objectives by these means found no defenders at all in jurisdictional disputes; in secondary boycotts the only controversy also was delimiting the "bad" and "legitimate" objectives.[4]

Accordingly, in amending the Wagner Act Congress provided in Section 10, relating to enforcement of the rights and prohibitions of Section 8, that in addition to the normal enforcement of other unfair labor practices by the Board on behalf of the United States, the Board should give investigation of such charges preferential status over all others except similar charges,[5] and, if supported, required the Board to seek a restraining order to maintain the *status quo* pending a final Board order enforceable by an appropriate U. S. Court of Appeals.[5] Thus, in this class of cases, and this alone, the offending union would be required not only to defend its conduct before the Board, but could also be enjoined from pursuing its chosen course until a Court of Appeals made its order as a result of the Board's decision and the objections thereon voiced before it.

A union charged with provoking such a jurisdictional dispute was, however, afforded the opportunity of preliminary dismissal before the foregoing-described mandatory duties of the Board became operative. This class of activity was conceived of as being peculiarly susceptible to interunion machinery for settlement. So Sections 10(k) and (l) together provide that after an 8(b)(4)(D) charge is filed the offending union may procure dismissal

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[4]2 Leg. Hist. 1455 (Senator Murray): also excerpts from Presidential message on the State of the Union, Jan. 6, 1947, reprinted 1 Leg. Hist. 608.
[5]Sec. 10(1).

by settling its claim within ten days, or it may thereafter submit to and abide by an award of the Board. If, as here, the union charged will not settle its contentions by the machinery available for that purpose,[6] and does not abide by the Board's decision,[7] then the full power of the Board and the Federal judicial machinery is brought against it on behalf of the United States.

In addition to the duties of the Board in the enforcement of the public policy respecting jurisdictional disputes and secondary boycotts, these contests were also thought serious enough that in Title III of the Labor-Management Relations Act Congress provided that the union which engaged in them should answer to any person injured thereby to the extent of the damage caused. Like the Sherman Act and the Fair Labor Standards Act,[8] which create for their offenders the dual hazard of enforcement at the instance of the United States and damages to wipe out the private injury, this right was clearly regarded not only as recompense to the person damaged by such acts, but also as an additional discouragement against resorting to such means in the first place.[9]

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[6]Tr. p. 427.

[7]82 N.L.R.B. 650.

[8]Hereafter discussed in Subdivision IB, page 27 et seq., of this brief.

[9]Respecting the floor amendment providing for this private relief Senator Ives (N.Y.), a member of the Senate Committee on Labor and Public Welfare said (2 Leg. Hist. 1357):

> "I know of no reason in the world why one suffering from such abuses or violations should not have the right to recover damages, not only in the Federal Court but in any court.
>
> " . . . Once it is established that recovery may be had for damages in the Federal courts, it will go a long way toward stopping the jurisdictional dispute and secondary boycott."

Senator Taft, in charge of the bill, upon introduction of the floor amendment which is now Section 303 of Title III (with minor changes immaterial here) said (2 Leg. Hist. 1371):

This review of the legislative scheme for dealing with jurisdictional disputes will clarify appellee's more specific following points:

A. On the Same Facts the Board and the Courts Acting Independently Cannot Reach Materially Differing Results.

Appellants' contention is apparently founded on the misconception of the amended National Labor Relations Act that the Board in a "10(k) hearing" has the widest kind of discretion in awarding work tasks in jurisdictional disputes, including consideration not only of previous Board action but contracts, the tradition of the industry, etc. In fact, much of appellants' evidence was offered upon this mistaken theory. From this appellants reason that the Board has the right and duty to adjust the jurisdictional or "work" controversy on the merits, and that the practices of the accused union cannot be an offense until the Board has disposed of those merits and the union has failed to abide by the resulting award. Thus, it must then be contended, the aggrieved person cannot state a claim before the courts, whatever the language of Section 303(a)(4) until the Board has spoken, since it would be *the refusal to abide by the Board's decision,* not the commission of the acts interdicted by the statute, which would require the offender to answer in damages.

"It retains simply a right of suit for damages against any labor organization which undertakes a secondary boycott or a jurisdictional strike. ". . . Further, I think the threat of a suit for damages is a tremendous deterrent to the institution of secondary boycotts and jurisdictional strikes. . . . I do not think such suits will often be brought, because I believe the possibility of a suit will be a sufficient deterrent to prevent unions undertaking this kind of . . . activity."

The readiest answer to this conception of the statute is, of course, that this is not what Congress provided, and that if Congress had meant to so provide it would have been easy enough to have said so. To a contention similar to this, i.e., that though the statute did not so provide, an administrative determination should be held final because such was the logic of the Act, the United States Supreme Court returned the short answer that:

> "If Congress had deemed it necessary or even appropriate that the Administrator's orders should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so." *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 64 S. Ct. 474, 88 L. Ed. 635.

If Congress had intended that the action entitling an injured person to damages under Section 303(b) was not the commission of the acts described in Subsection (a)(4), but the failure of the defendants to abide by an award of the Board under a 10(k) hearing, Congress had ample words at its command to have described that intention. That it did not even hint at such an objective, but throughout used language which indicated clearly it did *not* so intend, is conclusive that appellants have not correctly read Section 303 of the statute.

Moreover, Congress knew precisely what it was doing when it expressly omitted the language appellants now say this Court must supply, for the bill's method of dealing with jurisdictional disputes did not escape observation and critical comment during its course after the floor amendment was offered which added Section 303 to the Senate Committee bill. For example, one of

the clearest expressions not only of what the bill means in this field, but of disproof that it provides what appellants say it must, came from Senator Morse, a member of the Senate Committee on Labor and Public Welfare and a generally recognized expert on Federal labor law. He said of the bill's method of dealing with jurisdictional disputes:

> "I do want to make the additional argument against the Taft substitute, that it makes it possible for *two different district courts and the N.L.R.B.* to be dealing *simultaneously* with the same subject matter. The Board would be conducting a hearing looking to a cease-and-desist order. At the same time the Board would be required, . . . to seek injunctive relief, which means that the (sic) would be two actions going on at the same time, or that there might be . . .
>
> "Finally, under this proposal, we have a third agency—probably a different Federal court—deciding whether a damage action lies. Such dispersion of authority, in my judgment, is very bad legislative policy." (Emphasis supplied) 2 Leg. Hist. 1358.

Notwithstanding this and similar objections the amendment was retained in the bill enacted by both Houses of Congress. Then, as one of his reasons for vetoing the measure the President's veto message of June 20, 1947, contained the following language in comment upon the bill's provisions for boycotts and jurisdictional strikes:

> "Moreover, since these cases would be taken directly into the courts, they necessarily would be settled by the judiciary before the National Labor Relations Board had a chance to decide the issue. This would thwart the entire purpose of the National

> Labor Relations Act in establishing the Board, which purpose was to confer on the Board, rather than the courts, the power to decide complex questions of fact in a special field requiring expert knowledge." 1 Leg. Hist. 920.

And while the record here discloses that the Board's "10(k) decision" did not follow, but preceded, the lower court's judgment, the vigorous challenges to other criticisms of the bill in the veto message did not gainsay the President's assertion of dual Board and court jurisdiction over "jurisdictional disputes" under the Act.

Thus the statute by its terms not only proves that appellants' construction is the precise opposite of the statute's meaning, but the history of the Act, and especially of the Section in question, clearly demonstrates that if appellants were correct in their construction, then every notion in Congress, critical and supporting, of the Act's construction was wrong. It seems apparent from this that appellants—and they alone—have misread the Congressional provisions dealing with jurisdictional disputes and their remedies.

In addition, however, appellants' position has other cogent defects as well.

While this court is not, and the court below was not, concerned with whether the actions of appellants were unfair labor practices under Section 8(b)(4)(D) of the National Labor Relations Act, but only whether they were " . . . unlawful, for the purposes of this section only, . . ." under Section 303 of the Labor-Management Relations Act, a short analysis of the treatment of jurisdictional disputes in the National Labor Relations Act

may serve to disclose how groundless is appellants' concept that the Board in a 10(k) hearing acts as a *bona fide* arbitrator of jurisdictional disputes in their technical aspects. For the fact is that while the *National Labor Relations Act* (not Title III of the Labor-Management Relations Act) in its inception provided that "jurisdictional disputes" should be subject to special handling *on the merits* (which would include interunion agreements over jurisdiction, "historical" or "traditional" assertions of the right to perform certain work, and the like), that concept was abandoned. As the Act was finally passed the inquiry is made by the statute a mere formality.

Originally the jurisdictional disputes provisions of the bill were the particular province of Senator Morse, a majority member of the Senate Committee on Labor and Public Welfare. His bill, S. 858,[10] made such disputes unfair labor practices, but described them as disputes over whether work was performed by employees who were or were not members of a particular labor organization.[11] Since the dispute described was a contest solely between two or more unions, as to which should or should not perform particular work and with-

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[10]2 Leg. Hist. 1001.

[11]Section 8(b)(2)(A) of S. 858 (Senate Committee Comparative Print, March 18, 1947, p. 9). The specific language is:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(2) to engage, or to induce or encourage the employees of any employer to engage, in a strike or in a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, in the course of their employment (A) because particular work tasks of such employer or any other employer are *performed by employees who are or are not members of the particular labor organization*, . . ." (Emphasis supplied)

out reference to the employer's position, it was natural that the Senator insert in his bill a Section 10(k), which was identical[12] with the corresponding subsection as finally reported[13] (except that the descriptive subsection reference was of course changed). And with the offense so described, Senator Morse's "arbitration" method of dealing with an unresolved dispute was sensible, since the contest would be only between unions claiming certain work.

But though Section 10(k) remained as it had been in S. 858, the thing it was supposed to deal with was changed, not in conference as appellants suppose,[14] but by S. 1126, as reported.[15] There the *employer's assignment* was made the crux of the contest, but as between two or more unions still.[16] In this form the description of the dispute passed the Senate in H.R. 3020 and went to conference.[17]

Then the conferees made still another change in Section 8(b)(4)(D) still without changing Sec. 10(k), and thus removed the last real function for the Board under the latter section. As the bill came back from conference[18] and was enacted over a veto[19] it designated additionally employees in any trade, craft, or class to whom

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[12]Ibid., p. 16.

[13]1 Leg. Hist. 130.

[14]Appellants' brief, p. 46.

[15]1 Leg. Hist. 113.

[16]As reported to the Senate, and then as passed, Sec. 8(b)(4)(d) read " . . . for the purpose of forcing or requiring any employer to assign to members of a particular labor organization work tasks assigned by an employer to members of some other labor organization unless . . ."

[17]1 Leg. Hist. 291.

[18]1 Leg. Hist. 511.

[19]2 Leg. Hist. 1657.

work might be assigned by the employer.[20]

Thus, the demise of the Board's discretionary duty under Section 10(k) is complete with the change in theory and language of Section 8(b)(4)(D), from the "craft union" approach to the assignment of work principle without a corresponding change in Section 10(k). As the two now stand the Board's duty is not to *decide between union claims,* which may be on certification, interunion work-defining agreements, traditional jurisdiction, *et cetera,* for which a skilled arbitrator would be needed. Instead, the questions for decision are simply: (1) To whom had the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Section 9(c) of the National Labor Relations Act?

Brought down to the issue here, the statute as enacted required no different approach, no different test, no different inquiry by the Board, in assessing the 8(b)(4)(D) violation charged by appellee, than that of the lower court in determining the validity of appellee's cause of action under Section 303(a)(4) and (b). That appellee had assigned the work in question—the loading of appellee's barges—to members of its plant crew, all of whom were represented by Local M-271, I.W.A. (CIO), was never even questioned, either in the court

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[20]Though set out in appellants' brief, the pertinent language of the subsection is worth repeating here for comparative purposes with footnotes 11 and 16, *supra*:

". . . forcing or requiring any employer to assign particular work to employees in a particular labor organization or *in a particular trade, craft, or class* rather than to employees in another labor organization or in another *trade, craft, or class, unless* . . ." (Emphasis supplied)

below or before the Board in the "10(k)" proceeding. In the Board case it was found,[21] here it was stipulated,[22] that the appellee was not failing to conform to a certification of the National Labor Relations Board in making the aforesaid assignment, since there was no certification at all. Thus, while the Board has at least twice held[23]—though without review of the rulings' correctness by any court—that the legislative progress of Section 8(b)(4)(D) did not in effect delete Section 10(k), its decisions clearly disclose that its inquiry is purely fact-finding and ministerial in character, having nothing of the skilled interunion jurisdictional arbitration about it.

If the narrower, craft union approach to the problem had been retained intact from the Morse bill version of Section 8(b)(4)(D), there would have been not only logic, but necessity, in adding as a condition precedent to Section 303(b) that the Board first arbitrate the issues. However, the sections grew apart; the procedure stood still but the substance changed. And since the major change took place in the Committee bill, much before Section 303 was attached as a floor amendment, no condition was put in Section 303(b); it would serve no useful purpose, for the question of who is entitled to the work (absent a Board certification) is decided by the employer.

If appellants' reference to *Winslow Brothers,* 90 N.L.R.B. 188 (Br. 49), is intended to indicate to the

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[21]See 82 N.L.R.B.650.

[22]Tr. 1056.

[23]Moore Drydock Company, 81 N.L.R.B. 1108, and Juneau Spruce Corp., 82 N.L.R.B. 650, *supra.*

court that the National Labor Relations Board has in that case decided a jurisdictional dispute on the traditional "craft union" basis where there is an employer assignment involved, they clearly misread the case. The dispute there was between two existing bargaining units as to which contract included the work in question. Thus the matter there involved was one of two overlapping contracts, the employer uncertain and unwilling to risk assignment and the hostility of the losing union. No such question is here present.

Also, the two undesirable results appellants see in a construction contrary to theirs (Br. 49, 50) are of course wholly nonexistent where the test is that of the employer's assignment. Those results would follow, as appellants fear, only if the "craft union" approach to the objective of the controversy had been left in the statute, and Section 10(k) had been left out. Since neither of these events happened, appellants' fears are groundless.

B. The Doctrine of Primary Jurisdiction Does Not Support but Refutes Appellants' Position.

Appellants rightfully say in their brief[24] that the court below did not submit to the jury the issue whether or not the I.L.W.U. members were entitled to perform the work of loading appellee's barges, since it did not conceive this inquiry to be an issue in the case. In this concept of the law the trial court was clearly correct. As we have heretofore stated, the question is not, and has never been since the statute's enactment, who is "*entitled* to perform the work" in question; given the

[24]Appellants' brief, pp. 52-53.

employer's assignment and the lack of a Board certification, even the Board whose business enforcement of the National Labor Relations Act is, cannot now under the terms of Section 10(k) decide who is *entitled* to perform the work in issue after the manner of a craft union contest, the employer standing neutral.

Notwithstanding this erroneous basic concept of the Board's duty, appellants argue that there is a general doctrine of primary jurisdiction in the field of statutory construction, and rely principally upon the Interstate Commerce Act and *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*,[25] in support of the contention.

Because the doctrine adverted to does not run at large among all statutes emanating from Congress, the gist of appellants' argument must necessarily be that the powers of the Interstate Commerce Commission in rate-making, and the powers of the N.L.R.B. in jurisdictional dispute cases, are similar or identical, and that the objectives of the two acts are likewise similar or identical. Congressional creation of an administrative agency in a statute does not *ipso facto* mean it has the same powers as such agencies under other statutes.[26] For while the Interstate Commerce Act clearly clothes the Commission with the duty of determining the reasonableness of rates,[27] and thus obviously requires that prerequisite before a shipper can recover for an "unreason-

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[25]204 U.S. 426,27 S. Ct. 350, 51 L. Ed. 553.

[26]Compare the status of the Federal Trade Commission (*Federal Trade Comm. v. Gratz*, 253 U.S. 421, 40 S. Ct. 572, 64 L. Ed. 943) with that of I.C.C. (*Great Northern Ry. Co. v. Merchants' Elevator Co.*, cited *post*).

[27]*Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U.S. 184, 33 S. Ct. 893, 57 L. Ed. 1446.

able" rate, other statutes make no such preliminary requirement of the Federal agency in whose domain their enforcement lies. Such are the Sherman and Clayton Acts and the Fair Labor Standards Act,[28] for example.

The unsuitability of the appellants' argument to the scheme of the statute now being considered is aptly noted in *Frey and Son v. Cudahy Packing Co.*, 232 F. 640 (1916). Plaintiff there sued for treble damages under the Sherman and Clayton Acts.[29] The opinion (U.S.D.C. Md.) is:

> "Defendant entered a demurrer to these counts of the declaration. It says that under the Clayton Act the courts have no jurisdiction of suits brought to recover for price discriminations, until after the Federal Trade Commission has determined that there was such discrimination. By analogy it relies upon the case of Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and the cases which have followed it.
>
> "It is unnecessary here to determine whether the law laid down in those decisions is or is not ever applicable to price discrimination forbidden by the Clayton Act. The facts alleged make a case analogous to that of Pennsylvania Railroad Company v. International Coal Company, 230 U.S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, in which it was held that the courts had jurisdiction to award damages for the discrimination therein set up, although the Interstate Commerce Commission had not acted or been asked to act.
>
> "The demurrer will be overruled."

As this Court has recently noted in *Reconstruction Finance Corp. v. Spokane, P. & S. Ry. Co.*, 170 F. (2)

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[28]Discussed post, pp. 27 to 29.
[28]Discussed post, pp. 27 to 29.

96,[30] the Interstate Commerce Act confers upon the Commission the power in all cases to determine all factors relating to reasonableness of rates. The footnote quotation used is so clear that it bears repetition here:

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and *calls for an exercise of the discretion of the administrative and rate-regulating body*. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals." *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U.S. 184, 185, 196, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. (Emphasis supplied)

But if the words of a tariff are used in their ordinary sense, or the question is one of fact concerning the identity of a commodity, the court may decide the issue.[31]

The Interstate Commerce Act and the cases under it not only do not support appellants' view, but confirm the contrary construction.

First, as above noted from footnote 3 in this Court's

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[30]See especially footnote 3, p. 98.

[31]Cf. *Great Northern Ry. Co. v. Merchants Elevator Co.,* 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943.

opinion in the *S. P. & S.* case, *supra,* the great objective of the Commission's power is to assure uniformity in rates on a nation-wide basis. Here, in jurisdictional disputes in the field of labor, the nation-wide uniformity is even in theory undesirable and in practice impossible, whether it be the early discretionary approach of the Morse bill or the employer assignment inquiry of the statute as enacted (though uniformity in the same dispute is provided by the ministerial findings).

Second, even under the Interstate Commerce Act the cases, of which *Great Northern Ry. Co. v. Merchants' Elevator Co.,* cited in footnote 31, *supra,* is an example, reject the doctrine that the complainant must in all cases first resort to the Commission for a decision.

And third, in the Interstate Commerce Act Congress left it wholly to the Commission to say what is a reasonable rate, which remains undiscoverable until the Commission acts, untrammelled by any mandate but the Constitution; here, with that example before it, Congress still provided that in jurisdictional disputes the Board should have no duty but factual inquiry, which any tribunal could make and no two reasonably make differently.

Thus the appellants' example establishes contrast, not similarity.

But though the Interstate Commerce Act and the cases under it do not establish, but deny, similarity with the instant question, there are statutes similar in stated Congressional policy; the Sherman and Clayton Acts[32]

[32] 15 U.S.C.A. §§ 1-7, 15; 15 U.S.C.A. § 12 et seq.

and the Fair Labor Standards Act[33] are the examples coming most readily to mind. In each case the statute sets forth a national policy, respectively prohibiting combinations which restrain trade and overlong hours or sweatshop wages, with enforcement in Federal agencies. And in addition each gives the private person injured by the prohibited activity a cause of action against the wrongdoer,[34] which in neither case depends upon the action of the Federal enforcement agency to perfect.[35]

And while in the case of the Sherman and Clayton Acts the Department of Justice or Federal Trade Commission may seek to enforce against a defendant one conception of the result of his acts, and the person suffering injury another, or in the case of the Fair Labor Standards Act the Administrator may seek through a court to enforce compliance by the defendant independent of the injured employee's damage action and even at variance with it, in either case there need not be two final, nonappealable and conflicting orders or decisions binding the same defendant for the same acts, since the defendant may have review of both the publicly and privately-brought proceedings.[36] So here, though a union may be charged before the Board with a "public wrong" by the United States, and sued in a court for private damages, where it engages in a jurisdictional dispute, it can "appeal" from the Board's order by resisting its en-

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[33]29 U.S.C.A. § 201 et seq.

[34]Sherman Act: 15 U.S.C.A. § 15; Fair Labor Standards Act: 29 U.S.C.A. § 216(b).

[35]Sherman and Clayton Acts: *Frey & Son, Inc. v. Cudahy Packing Co., supra,* 232 F. 640; Fair Labor Standards Act; *Colan v. Wecksler,* 45 F. Supp. 508.

[36]*Federal Trade Comm. v. Gratz, supra; U. S. v. Darby Lumber Co.,* 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609; also 28 U.S.C. § 1291 and § 1254.

forcement[37] or actually appeal.[38] And it will also have the right to appeal the court's damage judgment. And, as in this case, both rights of appeal are to the same court.

Thus the scheme of the Labor-Management Relations Act is precisely the same—in the field of boycotts and jurisdictional disputes—as is the Sherman and Clayton Acts or the Fair Labor Standards Act; commission of the same prohibited activity may at once make the transgressor liable to answer to the United States for a "public wrong," and to the private person injured thereby for his damages. And there is no more cause to say that the damage action here must wait until the United States, through the Board, has acted than to say that the laborer denied his statutory wages must wait on the Administrator before he may recover his pay, or that the victim of a conspiracy to restrain trade must await the conclusion of the Department of Justice or the Federal Trade Commission ere he sues to recover the treble damages to which he is entitled. The scheme of all three statutes in this respect is the same.[39]

For any one, or all, of the foregoing reasons it appears clear that the appellants have read, not what the statute provided with respect to the administrative functions of the N.L.R.B. in jurisdictional dispute cases, but what the early drafts of the legislation in question would have provided if left unchanged. And because of this basic fallacy—that the Board is given an almost limitless latitude to decide which of two or more contesting

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[37]National Labor Relations Act, Sec. 10(e).

[38]National Labor Relations Act, Sec. 10(f).

[39]See, for example, Senator Taft's parallel between this section of the Act and the Sherman Act (2 Leg. Hist. 1398).

unions is entitled to perform work tasks with the employer standing indifferent—appellants' whole view of the statute must fall.

II.

THE COURT BELOW HAD JURISDICTION OF THE PARTIES AND OF THE SUBJECT MATTER OF THE ACTION AND WAS RIGHT IN ITS RULINGS

The court below, in a carefully considered opinion (83 F. Supp. 224) ruled that it was a "district court of the United States" within the meaning of Section 303(b) of the Labor-Management Relations Act, which reads as follows:

> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

This ruling appellants assign as error.

We think it virtually impossible for the court to have reached any other conclusion. To have held, as appellants urged, and here urge, that the Alaska court was not a "district court of the United States" within the meaning of that section of the Act, would have been to discard every expression of Congressional intent in the Act itself and to elevate one—and minor—rule of statutory construction above every other.

Not only was the Alaska court right in holding that it was a "district court of the United States," but as it was "any other court having jurisdiction of the parties," its rulings were correct.

At the outset of this discussion we think it should be noted that appellants, possibly without intent to do so, have done a disservice to a clear analysis of the meaning of the phrase "district court of the United States" in the entire Point II of their brief, by the uniform use of capital letters in the words "district court." The statute under consideration nowhere specified "District Courts of the United States" nor does the statute creating the Alaska court, whether in its original or amended form, capitalize those words. Lastly, the lower court in its opinion above referred to did not hold that it was a "District Court of the United States," but that it was a "district court of the United States" within the meaning of the Act because it was vested with the jurisdiction of a "district court of the United States" (83 F. Supp. 225, 227).

Obviously the decision of this court would not turn on the capitalization or lack of it, of the words "district court." But the constant misquotation of the phrase, even in a footnote which purports to be a direct quotation taken from the Act, indicates that perhaps there is a distinction between a "district court of the United States" and "District Court of the United States," in which the capitalized language would signify the "Article III" or Constitutional type of court, whereas the phrase with the first two words in lower case might indicate

Federal courts in general, including legislative courts. If there is any implied distinction in the use of capital letters in the phrase in question, it should be pointed out that the lower case for "district court" is used throughout the Act and that the direct quotation on page 72, footnote 37 of appellants' brief is, for that reason, not accurate.

A. The Alaska Court Is a District Court of the United States Within the Meaning of the Act.

1. The references to the Federal courts throughout the Act, and the applicable judicial decisions, establish that the designations of the courts were not words of art, but descriptions of all courts created by Congress.

Appellants argue that when Congress used the words "district court of the United States" in Section 303(b) of the Act, it was using them in the technical sense of "Article III" or "Constitutional courts," and not "Legislative courts" authorized by Article IV of that document. The only inquiry here is which meaning fits the evident purpose of the Act. *People of Puerto Rico v. Shell Co.,* 302 U.S. 253, 58 S. Ct. 167, 82 L. Ed. 235; *Atlantic Cleaners and Dyers v. United States,* 286 U.S. 427, 52 S. Ct. 607, 76 L. Ed. 1204.

The Labor-Management Relations Act containing the language in question was enacted June 23, 1947. At that time the status and jurisdiction of the Alaska court had long been specified by Congress as follows:[40]

[40]Act of June 6, 1900, 31 Stat. 322 as amended. Section 9 of the Act of June 25, 1948, 48 U.S.C.A. § 101 changed the word "Territory" to "District" but otherwise retained the quotation intact.

> "There is established a district court for the Territory of Alaska, *with the jurisdiction of district courts of the United States* and with general jurisdiction in civil, criminal, equity and admiralty causes; . . ." (Emphasis supplied)

Because the language of the statute above quoted vests the Alaska court with the "jurisdiction of district courts of the United States," it would seem that when Congress used the words "district court of the United States" in a statute, that phrase would automatically include the Alaska court's jurisdiction, since Congress is deemed to legislate with knowledge of the terms and effect of its own statutes. 50 Am. Jr. 331, "Statutes," § 339; *The Penza,* 9 F. (2) 527, 528; *Continental Ins. Co. v. Simpson,* 8 F. (2) 439, 442.

The conclusion seems inescapable that when Congress said that the Alaska court was to have "the jurisdiction of district courts of the United States" it meant exactly what it said, even though that court is not technically a Constitutional, but a Legislative, court created under Article IV of the Constitution. Certainly, if Congress can confer on an "Article III court" additional administrative functions (*O'Donoghue v. United States,* 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356), it can clothe an "Article IV" court, over which its power is plenary, with the jurisdiction of Article III courts. The principle here is no different than that in which Congress may act under its Article I powers in the Constitution to make of District of Columbia residents "citizens of a state" for diversity purposes in Constitutional or Article III courts. *National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 69 S. Ct. 1173, 93 L. Ed. 1556.

If appellants are right here, of course, every use of the words "district court of the United States" in the Act designates, in the technical sense, a Constitutional court, and where a particular court created by Congress does not fall within this designation, it has no jurisdiction under the Labor-Management Relations Act.

Reading the Act as a whole, and examining the varying references to the Federal courts used therein, allows no other conclusion to be reached but that while, as this Court has recently said in *Printing Specialties, etc. Union v. LeBaron,* 171 F. (2) 331, ". . . the statute is by no means a model of draftsmanship, . . ." it is plain that Congress intended in its varying references to Federal courts not to use those references narrowly, but as descriptions of any courts which Congress had power to, and did, create.

Proof that Congress did not use its designation of courts in the technical sense is afforded by the varying designations employed throughout the Act.

Including the Section here in question, the phrase *"district court of the United States"* is used six times in the Act. (Sections 10(b), 208(a), 301(a), 301 (b) and 301(c)).

"district court of the United States (including the District Court of the United States for the District of Columbia)" is the court designated three times. (Sections 10(e), 10(j) and 10(l)).

An equal number of times Congress employed the words *"courts of the United States."* (Sections 11(4), 301(b), and 301(d)).

Once (Section 11(2)) Congress used an all-inclusive description: *"district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia."*

Lastly, in Section 302(e) Congress used all the above description except one: *"district courts of the United States and the United States courts of the Territories and possessions."*

The very fact that there are these five different designations for the Federal courts, though the Act is applied uniformly in the States, the District of Columbia, and the territories, should be enough of itself to disprove any semblance of validity in appellants' contention. But additional evidence arises in considering the effect of these variations if appellants' theory is correct.

The first notable feature of the foregoing list is the status of the District of Columbia court. Congress was obviously using the words "district court of the United States" in a nontechnical sense, for if it were not the words "District Court of the United States for the District of Columbia" would not have been added to "district court of the United States" at any place, since that court has been held to be a Constitutional or Article III court. *O'Donoghue v. U. S.*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356.

Further, and more interestingly, however, if appellants are right in making the maxim *expressio unius est exclusio alterius* the only rule of statutory construction to be applied here, then quaere if that court had

power to issue its injunctions in the mine and railroad strike cases (*U. S. v. United Mine Workers,* 77 F. Supp. 563, aff'd 177 F. (2) 29, cert. den. 338 U.S. 871, 70 Sup. Ct. 140, 94 L. Ed. 71; *U. S. v. B. of L. E.,* 79 F. Supp. 485, cert. den. 335 U.S. 867, 69 Sup. Ct. 137, 93 L. Ed. 412). For while other sections of this Act add "District Court of the United States for the District of Columbia" to the phrase here in question, Section 208(a) confers injunctive jurisdiction in national emergency strikes only on "district courts of the United States," and does not add the name of the District of Columbia court.

Moreover, the title "district courts of the United States and the United States courts of the Territories and possessions," is found in Section 302, Title III, which prohibits any payments by employers to employee representatives except in a very limited class of cases. By the definition of "commerce" and "industry affecting commerce" in Sections 2(a) and 501(3) it is clear this interdiction applies to such payments when made in the States, the District of Columbia, and the territories, but not in the possessions. In fact, the Act has no application whatever to employees employed in an industry affecting commerce in the possessions.

Yet if the Act is construed as appellants say it should be, the power to enjoin such payments, provided for in subsection (e), *is not* given to the district court of the District of Columbia, in which the prohibition applies, but *is* given to the courts in the *possessions,* in which the Act has no application! Laying to one side the inquiry whether there is such a thing as a "district court" in a "possession" of the United States, it is clear beyond

cavil that this, as all other references to the Federal courts, was not employed in the technical sense or as a word of art.

The same situation with respect to the possessions is found in the description of the courts contained in Section 11(2), for here once again the "district courts" of the "possessions" are described, although the Act has no application in those areas.

A more anomalous situation yet arises when considering the language used in Section 301. It should be noted that if appellants are correct that "district courts of the United States" means "Article III courts," only, then under Section 301 (b) a money judgment collected in a district court in the 48 states would be enforceable only from union funds, while a money judgment collected in a territorial court could be collected not only from union funds but from the private assets of the members.

This consideration affords almost conclusive proof that the reference to courts was used solely to denote all federal courts, without any distinction between the federal courts in the States and those in the territories.

There is no question but that the reach of the entire Act is not only to the continental United States, but as well to the territories and District of Columbia. There is nothing anywhere in the Act suggesting that its rights and duties do not apply to employees, labor organizations, and employers in commerce, or affecting commerce, wherever located within those limits. In this respect the entire Act is no broader or narrower than, but

is identical with, the National Labor Relations Act or "Wagner Act" as constituted prior to June 23, 1947. And the application of that Act to the territories, including the Territory of Alaska, was never successfully questioned. *N. L. R. B. v. Gonzales Padin Co.,* 161 F. (2) 353; *Alaska Salmon Industry, Inc.,* 33 N.L.R.B. 727; *Alaska Juneau Gold Mining Co.,* 2 N.L.R.B. 125. Cf. Footnote 15, *Vermilya-Brown Co. v. Connell,* 335 U.S. 377, 69 S. Ct. 140, 93 L. Ed. 76.

It is also significant that not only is the Act utterly silent that there is any distinction between the District of Columbia, the 48 States, and the territories in the enforcement of public and private rights and duties under it, but no word in any of the reports or debates on the Act in either House even hints at such an intention. It is clear that no distinction was intended. Certainly, if it had been thought that the status of the court in the District of Columbia, for example, should even be cast into question in its power to enjoin strikes and lockouts which imperiled the national welfare under Section 208(a),[41] there would have been some word in the legislative history indicating such a doubt. The "national emergency strike" issue was much in the minds of the lawmakers at the time this Act was in the process of passage, for *United States v. United Mine Workers of America,* 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884, had been decided March 6, 1947, during the Act's progress through Congress. That the words "district court of the United States" should have been intended in the narrow

[41]In addition to the theory of appellants, *Page v. Burnstine,* 102 U.S. 664, 26 L. Ed. 268, throws that court's status in doubt when considered with *O'Donoghue v. U. S.*, cited *post.*

sense, or that the varying descriptions of the courts used in the Act should have significance, much less decisiveness, is to strain statutory construction far past the breaking point.

Nor, it should be added, is inexact language in court designations confined to the Labor-Management Relations Act. The cases cited in part 3 of this subdivision[42] deal with just such matters as this. But, in addition, carelessness in the title of the lower court from which this appeal is taken is found in the new Judicial Code (Act of June 25, 1948), which presumably is far more carefully drafted with respect to the title of courts than is a general statute which described courts only in connection with its enforcement.

Appellants come here, their jurisdictional statement says,[43] by virtue of 28 U.S.C., Sections 1291 and 1294(2), both of which describe the court appealed from as

> ". . . the District Court for the Territory of Alaska . . . ."

Yet in Section 9[44] of that same Act of June 25, 1948,[45] which placed the new Code in effect, Section 101, first paragraph of 48 U.S.C., states:

> "There is hereby established a district court for the District of Alaska, . . ."

And see 28 U.S.C., Sections 373, 460, 660, 753, 963.[46]

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[42]Post, pp. 45 to 49.

[43]Appellants' brief, p. 3.

[44]1950 Revised Edition, "Miscellaneous Provisions," p. 320.

[45]In effect when the suit below was commenced.

[46]This fact is an indication that the Revisers Notes, and the new Code itself, fail to afford support for appellants' theory.

And an examination of the cases shows that there is some lack of judicial unanimity in the proper description of the Alaska court.[47]

2. Whether a Constitutional or Legislative court is intended depends on the type of statute being considered and the subject of the inquiry.

Appellants also imply that the phrase "district court of the United States" has never been otherwise construed than in the restrictive sense of a Constitutional court. This is of course not true. As appellants state, *McAllister v. United States,* 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693; *Mookini v. United States,* 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748; and *I. L. W. U. v. Wirtz,* 170 F. (2) 183, hold that as used in the context there considered, "district courts of the United States" has this restricted meaning. But the same phrase has been said in other cases to have the opposite meaning, denoting non-Constitutional, or Legislative, courts. Thus Congress should be said to know, in using the words in question, *not* that they have only one meaning, but that they refer to *either* Constitutional or Legislative courts as the context of the statute may indicate.

Ever since the opinion of Chief Justice Marshall in *American Insurance Co. v. Canter,* 1 Peters 511, 7 L. Ed. 242, which makes the distinction so clearly, the courts have, when occasion required, pointed out the difference between "Constitutional courts" created by Article III

[47]See for example *Aitchison v. Anderson,* 183 F. (2d) 922, 923, paragraph 1, and *Electrical Research Products Co. v. Gross,* 86 F. (2d) 925, paragraphs 1 & 2, both appeals from the Alaska court to this Court.

of the Constitution, and "Legislative courts" authorized by Article IV.

The distinction so made is vital to certain types of inquiries, such as that involved in *O'Donoghue v. United States,* 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356. There the issue was whether a judge of the Supreme Court of the District of Columbia was one of the judges "whose compensation may not, under the Constitution, be diminished during their continuance in office . . ." within the meaning of the Legislative Appropriation Act of 1932 (Ch. 314, 47 Stat. 382, 401). Congress had reduced the salaries of all judges it constitutionally could, and left it to the Supreme Court to decide in individual cases whether a given court was a Constitutional or Legislative court. In such case the Constitutional distinction between Article III, or Constitutional courts, and Article IV, or Legislative courts, was the entire burden of the inquiry. There are many other such cases, where the distinction is vital to, and the only point of, the inquiry before the court because it inheres in the subject matter or point being considered. Cf. *McAllister v. U. S.,* 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693, *supra.*

The second class of cases in which the distinction is necessary is where it clearly appears that the Congress in enacting the statute intended the language in question to apply to "courts of the United States" as created under Article III, even though a constitutional question was not involved. This is probably the more numerous class of cases, and is best illustrated by *I. L. W. U. v. Wirtz,* 170 F. (2) 183. This case involved the question whether the Norris-LaGuardia Act (29 U.S.C.A. § 101

et seq.) inhibited the injunctive jurisdiction of the circuit courts of the Territory of Hawaii under the reach of Section 13(d) of that Act. From the legislative history referred to in the opinion it is abundantly clear that the provisions of that Act were intended for and expressly limited to courts created by Congress under Article III, Section 1 of the Constitution. Thus, there not the words, but the legislative history of the Act, showed clearly that the strict or technical meaning of the words inhered in the Act construed.

The third group of cases involve statutes where it is obvious from the words used, the scheme of the Act, and its legislative history, that the foregoing distinctions are not material and that the phrase in question in the Act was not one of art but only of description of a class. Such is the Federal Trade Commission Act, in which the phrase was interpreted broadly, without reliance on the constitutional distinction but solely on broad rules of statutory construction and Congressional intent in the *Klesner* case, cited *post*. So also was the Maritime Requisitioning Act (Act of June 6, 1941, 55 Stat. 242) as amended by the Act of March 24, 1943, 54 Stat. 45, in which claimants for requisitioned vessels in the custody of the "United States district court" were allowed to bring suit therein. In *The Maret,* 145 F. (2) 431, the District Court of the Virgin Islands was held to be a "United States district court' within the meaning of the above Act, though "that court is not, speaking strictly, a 'United States district court' " (page 436, note 28). So also was Section 858 of the Revised Statutes of the United States relating to the competency of wit-

nesses, under which in *Page v. Burnstine,* 102 U.S. 664, 26 L. Ed. 268, the court construed the phrase not as one of art, but of description, and found the District of Columbia courts to be courts of the United States for this purpose. Of this case the Supreme Court in the *McAllister* case, *supra,* said (11 S. Ct. 949 at 953):

> "And there is nothing in conflict with this view in Page v. Burnstine, 102 U.S. 664, where it was held that Section 858 of the Revised Statutes of the United States, relating to the competency as witnesses of parties to actions by or against executors, administrators, or guardians, applied to the courts of the District of Columbia as fully as to the circuits and districts of the United States. That conclusion was reached, not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power of the United States was vested by the Constitution, but because all the acts relating to the competency of witnesses, when construed together, indicated that that section of the Revised Statutes applied to the courts of the District of Columbia."

3. The statute clearly uses "district court of the United States" to mean any court created by Congress.

From what has heretofore been said it appears inescapable that:

(1) The entire Act, in its rights, machinery, and penalties, is applicable to employees, their representatives, and employers in an industry or activity in or affecting commerce as defined in Sections 2(6) and 501(3), which includes the territories and the District of Columbia as well as the States of the United States;

(2) The Federal courts, the judicial system in which the Act's rights, machinery, and penalties find enforcement, are described five different ways in the Act, viz:

"courts of the United States"
"district court of the United States"
"district court of the United States (including the District Court of the United States for the District of Columbia)"
"district court of the United States and the United States courts of the Territories and possessions"
"district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia;"

(3) There is no indication in the language of the Act itself, either expressly or by implication, that the untoward results which would flow from a strict construction of these varying designations are contained in the Act's scheme, but rather, every indication is to the contrary; and

(4) There is every indication in the legislative history of the Act, negatively by the complete lack of any statement in the committee reports, debates, and analyses of both opponents and proponents, and affirmatively by the statements that the power conferred was being given to "the Federal courts,"[48] that the courts referred to were those created by Congress under any of its Constitutional court-creating powers and synonymous with the scope of the Act.

Certainly also, the distinction between Constitutional courts under Article III, and Legislative courts under

[48]See footnote 9, p. 14, *supra*. See also 2 Leg. Hist. pp. 1357, 1371-3.

Article IV does not inhere in the subject matter of this Act or the action under it, as in *O'Donoghue v. U. S.*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356, or *McAllister v. U. S.*, 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693. And there is nothing in the Act or its legislative history to indicate that it was intended to apply only to Constitutional courts, as in the Norris-LaGuardia Act.[49]

The designation of the Federal courts used in this act does not bring the case within either the first or second class of cases referred to in the immediately preceding subdivision of this brief. But the variation in words used to designate the courts on which power is conferred, the scheme of the Act, and its legislative history, all bring it squarely within the class of cases in which the courts have held that the designation of a court in a statute was not one of art, but only descriptive of a class.

In this class of cases come *The Maret,* 145 F. (2) 431, 437, and *Page v. Burnstine,* 102 U.S. 664, both cited *supra.* But there are many others as well, some of which are relied on by appellants in support of their contention, which are further authority for the appellee's assertion that when the intent of Congress is found to be fulfilled by a broad, and not a restrictive, use of the language employed to designate a court, that usage will be given.

The case identical in principle to the case at bar, and decisive in rejecting appellants' theory, is *Federal Trade Commission v. Klesner,* 274 U.S. 145, 47 S. Ct.

[49]The distinction between the legislative history of this Act in this respect, and the legislative history of the Norris-LaGuardia Act on the same issue, quoted by this Court in *I. L. W. U. v. Wirtz,* 170 F. (2d) 183, is of considerable significance.

557, 71 L. Ed. 972. That case involved a "cease-and-desist" order of the Federal Trade Commission, which forbade Klesner from continuing certain practices in the District of Columbia found to constitute unfair competition. He disregarded the order, whereupon the Commission sought its enforcement in the Court of Appeals of the District of Columbia under Section 5 of the Act, which provided that in such cases

> ". . . the Commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person . . . resides or carries on business, for the enforcement of its order . . . ."

Klesner urged, and the District Appellate Court held, that the Commission's petition should be dismissed because the Court of Appeals for the District of Columbia was not a "Circuit Court of Appeals of the United States."

The Supreme Court reversed, holding that while the Appellate Court for the District of Columbia was not technically a "Circuit Court of Appeals of the United States," it was the evident intent of Congress to provide that the Federal courts holding the first appellate jurisdiction over the Federal trial courts should have power to enforce the Commission's orders, and that the District of Columbia appellate court met that description. The court defined its problem thus:

> "The question, therefore, which we have to answer, is whether, when Congress gave the Commission power to make orders in the District of Columbia, with the aid of the Supreme Court of the

> District, in compelling the production of evidence by contempt or mandamus, it intended to leave the orders thus made, if defied, without any review or sanction by a reviewing court, though such review and sanction are expressly provided everywhere throughout the United States except in the District. We think this most unlikely, and therefore it is our duty, if possible in reason, to find in the Trade Commission Act ground for inference that Congress intended to refer to and treat the Court of Appeals of the District as one of Circuit Courts of Appeals referred to in the Act to review and enforce such orders."

The court then referred at length to *Steamer Coquitlam v. United States,* 163 U.S. 346, 16 S. Ct. 1117, 41 L. Ed. 184, and quoted from the opinion in that case the following language:

> " 'Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—*by whatever name those courts were designated in legislative enactments*—should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective territories among the existing circuits.' " (Italics supplied by appellee).

Immediately thereafter the court in the Klesner case said:

> "We think we may use the same liberality of construction in this case."

Noting that the District of Columbia appellate court exercised ". . . exactly the same function as the Circuit Court of Appeals does . . ." with respect to the District trial court, the court continued:

> "We must conclude that Congress, in making its provision for the use of the Circuit Courts of Appeal in reviewing the Commission's orders, intended to include within that description the Court of Appeals of the District of Columbia as the appellate tribunal to be charged with the same duty in the District."

Then the court concluded with this significant statement:

> *"The law was to be enforced, and presumably with the same effectiveness, in the District of Columbia as elsewhere in the United States."* (Emphasis supplied)

The principles of the *Klesner* decision are squarely in point here. As has been previously noted,[50] the cause of action provided in Section 303 for the activities there described as unlawful is not only to make whole the injured person but, equally or even more importantly, is a part of the enforcement procedure of the Labor-Management Relations Act, 1947. And it is obvious that this hazard to the commencement of such specially-described conduct was to be equally applicable wherever it was made unlawful by the Act.

The instant case is even stronger than the *Klesner* case for here, unlike the Act there, the many different designations of the Federal trial courts, instead of one, would not allow a statement such as was made by Mr. Justice McReynolds in his lone dissent that the designation of the court was "deliberately chosen."

Since the *Klesner* case cited the relevant language in support of this same point from the *Steamer Coquitlam*

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[50]Footnote 9, *supra*.

v. United States, supra, we will not elaborate on the relevancy of that case also to the matter at bar.

The cases considering the status of the Hawaii court, rather than supporting appellants' position, quite clearly disprove it.

In the *Wirtz* case (*I. L. W. U. v. Wirtz,* 170 F. (2) 183) this Court, speaking through Judge Denman, adverted throughout the opinion to the legislative history of the Norris-LaGuardia Act (29 U.S.C.A. § 101), which disclosed beyond doubt that that Act was not intended to encompass or inhibit any Constitutional or "Article III" courts in its scope. The legislative history of the Act now before the Court is completely contrasting, however, for there is no word whatever to indicate that Congress had a similar intent to that so carefully and clearly pointed out in the *Wirtz* case. All of the evidence of that intent is that the courts named, by whatever designation used, were to be those where the Act was applicable, which includes alike the territories, the District of Columbia, and the 48 States. Thus the *Wirtz* case compels the conclusion that when the legislative intent is *contra* to the one there found, then the Act is applicable to "district courts of the United States" in a territory.

Additionally, Judge Wirtz was, as Judge Denman pointed out, a judge of the circuit court of Hawaii, which is a territorially-created, and not a Congress-created, court.

Neither is *Mookini v. United States,* 303 U.S. 201, 58 S. Ct. 543, 82 L. Ed. 748, in point here. There the stat-

ute under which the Supreme Court promulgated its Criminal Appeals Rules specified the "district courts of the United States, including the district courts of Alaska, Hawaii, . . ." etc. When the Rules were first promulgated the Supreme Court carved out only "district courts of the United States," and omitted the other courts, in which the Rules were to apply. In construing its own intention, not that of Congress, it naturally followed that the Supreme Court should hold that when it selected one court of several named, it intended to exclude the others. How any other result could have been reached by the court can not be imagined; the Supreme Court could make its rules applicable to any or all of the courts named by Congress where its power could be exercised, but selected only one. But the case is no indication that "district courts of the United States," as used in this Act, should not mean the district court for the District of Alaska, which is specifically given by Congress

> "the jurisdiction of district courts of the United States"

when the legislative history and the language of the Act both indicate it was intended to apply to all its courts.

Nor does the confinement of the Federal Rules of Civil Procedure to the district courts in the States, until subsequent Acts make them applicable to the Federal courts in the Territories of Hawaii, Puerto Rico and Alaska, indicate any principle supporting appellants' position on the instant statute. Instead, the applicability feature of these rules affirms the position of appellee. For nothing either in the Act authorizing the promulga-

tion by the Supreme Court of Federal rules of civil procedure or its legislative history indicates any intent that the Act was to be applicable to the Federal courts in the territories. On the contrary, such evidence as there is in that history and language indicates the Congressional intent to confine the territorial scope of those Rules to the Federal courts in the 48 States; the subsequent legislation extending them to Hawaii and Puerto Rico, and later to Alaska, are simply confirmation of that intent. Thus the question of applicability of the Federal Rules of Civil Procedure invokes the same principle adopted by this Court in the *Wirtz* case, *supra,* i.e., that it is clear that the Congress intended to restrict the applicability of the Act in question to the more limited class of Federal courts sitting only in the States and called "Constitutional courts," as was the case in the Norris-LaGuardia Act.

Thus there is no magic in the words "district court of the United States". Nowhere in the cases have the courts considered the phrase in a vacuum, as appellants would have this Court do here. Everywhere throughout the cases the courts considered the designation of courts used by Congress as the context and legislative history of the Act intended. Where it is clear from the subject matter or the legislative history that Constitutional or Article III courts are intended by Congress, the courts so hold; when that context and legislative intent indicate that it was not so intended, the courts so hold. Thus the only question here is the meaning of the phrase as used in this Act, and for the foregoing reasons there is no support whatever for the contention of appellants.

Instead it is clear that Congress used, and intended to use, the phrase to designate those courts created by the Congress in any place in which the Act applied.

B. The Rulings of the Alaska Court Were Right if its Status Was Otherwise Than a "District Court of the United States" Within the Meaning of the Act.

Appellants say that because it misconceived its status, which was that of "any other court having jurisdiction of the parties" in Section 303(b), and not a "district court of the United States" within the meaning of the Act, the rulings of the court below were wrong in three respects: (1) as to jurisdiction; (2) as to service; and (3) as to the law of agency.

While it seems clear that the point is not material here since the court below was a "district court of the United States" within the meaning of the Act, the contentions made by appellants in this respect are likewise unfounded, for the rulings of the court below were proper either under the Act or independent of it.

1. As to jurisdiction.

Except for appellants' reference to the unreported case of *Burris v. Veterans Alaska Cooperative Co.,* concerning which appellee will comment later under this point, we do not understand appellants to use the word "jurisdiction" to mean that the Alaska court would have no right to hear and decide any case in which an unincorporated association was a party. And it would be

useless to labor the point since the court below is a federal court having *"the jurisdiction of district courts of the United States"*[51] and at least since 1922[52] the law in the federal courts has been that a partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.[53]

Thus, since the right being enforced against appellants is a right defined under the laws of the United States, i.e., under Section 303 of the Act, appellants as unincorporated associations could have been sued as entities by appellee in the Alaska court wholly aside from "the limitations and provisions of section 301" respecting suits against appellants as entities.

We are sure appellants' reference to the unreported case of *Burris v. Veterans Alaska Cooperative Co.* at page 76 of their brief, is not intended to imply that in the district court for the District of Alaska an unincorporated association cannot sue or be sued as an entity when the object of the suit is to enforce a right existing under the Constitution or laws of the United States. But even as to a suit on a nonfederal right, a matter not here involved, appellants have not correctly stated the decision of the Alaska court. Since one of counsel for appellants was also counsel in that case, as the memo-

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[51]A status it has occupied since the Organic Act of 1884. See footnote 40, *supra.*

[52]*U. M. W. v. Coronado Coal Co.*, 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975.

[53]*Williams v. U. M. W.*, 294 Ky. 520, 172 S.W. (2) 202, 149 A.L.R. 505; *Christian v. I. A. M.*, 7 F. (2) 481; *Thermoid Co. v. United Rubber Workers of America*, 70 F. Supp. 228, 233; Cf. *Electrical Research Products Co. v. Gross*, 86 F. (2) 925, 926.

randum decision and order reveals, we cannot understand how appellants' counsel could misread the opinion of the lower court. As its text, printed in full in the appendix of this brief reveals, it did not hold that a suit against an unincorporated association cannot be maintained in Alaska, but simply that in that case the plaintiff had not stated a cause of action against persons captioned there as members of such an association.

But even if counsel had read and stated the decision correctly it would have no pertinency here, since no right conferred by federal statute, which lets unincorporated associations sue or be sued as entities in federal courts, was there involved. Thus appellants' assumption that the suit against them as entities was dependent on the court's status as a "district court of the United States" as meant in the Act, and not as "any other court having jurisdiction of the parties," is wholly unfounded. Not only may a union sue or be sued as an entity in a federal court in the enforcement of a federal right (*United Mine Workers v. Coronado Coal Co.,* 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975), but where such a right is involved it may also sue or be sued as an entity in the state courts. *Williams v. United Mine Workers,* 294 Ky. 520, 172 S.W. (2) 202, 149 A.L.R. 505.

The cases cited by appellants (*Flexner v. Farson,* 248 U.S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250, and *Doherty & Co. v. Goodman,* 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097) have nothing to do with this issue, but only with whether a "nonresident" association is present in a state sufficient to require it to answer and be bound by a suit in the courts of that state. Thus their considera-

tion properly comes under the next point of this section immediately below.

2. As to service.

Passing over the question whether a union can properly be compared to a corporation or an unincorporated association "doing business", which implies profit or the pursuit of gain (Restatement Conflict of Laws, Section 167(a); *Zonne v. Minneapolis Syndicate,* 220 U.S. 187, 31 S. Ct. 361, 55 L. Ed. 428) the gist of appellants' complaint here is that the service of process upon a nonresident unincorporated association was made easier if the court below was a "district court of the United States" within the meaning of the Act than if it was "any other court having jurisdiction of the parties," by reason of the provisions of Section 301(c). However, appellants' argument actually is that a labor union, as an unincorporated association, cannot be sued outside the state wherein it maintains its headquarters. Significantly, appellant International does not discuss the status of Albright, the International's employee who was served, but simply objects that it was served in a district other than that in which it has its headquarters.

At least since *Sperry Products, Inc. v. Association of American Railroads,* 132 F. (2) 408, cert. den. 319 U.S. 744, 63 Sup. Ct. 1031, 87 L. Ed. 1700, no doubt has been entertained that an unincorporated association can be sued in a district other than that in which it maintains its headquarters or principal office:

> "The pertinent part of the above (Sperry) decision is the court's recognition that an unincorporated association may be sued in a district other than where it maintains its principal office." *Thermoid Co. v. United Rubber Workers of America,* 70 F. Supp. 228, 234.

Indeed the recent case cited by appellants from the district court in New York (*Daily Review Corp. v. I. T. U.,* 26 L.R.R.M. 2503, 18 C.C.H. Labor Cases, par. 65,931) confirms this view completely. Appellants, in abstracting that case[54], note the distinction between that and the instant situation where the International ~~which~~ had its representative permanently stationed in Alaska, where they say:

> "The organizations had neither an officer *nor a representative* in New York, . . ." (Emphasis supplied)

There plaintiff simply served the president of the defendant, apparently on a temporary sojourn in the state, without any other identification of the defendant with the state. It is significant that as authority the case cites *Philadelphia & Reading Ry. Co. v. McKibbin,* 243 U.S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Davega, Inc. v. Lincoln etc. Co., Inc.,* 29 F. (2) 164 and *Amtorg Trading Corp. v. Standard Oil of California,* 47 F. Supp. 466, in all of which cases the defendant corporations had no connection with the state in which service was attempted. In the first two cases the presidents of the corporations were served while on temporary trips in the state, and in the third, service was attempted on a subsidiary corporation which was doing business in the state, although its parent was not. Thus, rather

[54]Appellants' brief. p. 77.

than supporting appellant International's position, the cited case and its authorities controvert it, since by holding service invalid because the defendant carried on no activities and had no representative in the place it was sued there is a positive indication that if the contrary had been true the service would have been good. It certainly is not authority that a union cannot be sued in any other district than that in which it has its headquarters.

Flexner v. Farson and *Doherty & Co. v. Goodman, supra,* cited by appellants as hereinabove noted, are inapt for this same reason. Moreover, appellants do not correctly read and state the decision in the *Doherty* case (Br. 75, footnote 40). The qualifications there were not those the Supreme Court insisted upon, but those of the Iowa statute.

Conceding, for the purpose of argument, that the same "due process rules" are applicable here as are applicable in straightforward questions of whether a corporation or an association is "doing business" in a foreign state sufficient to subject itself to process there, the issue is the nature of the activities conducted in the place where the court is asked to hear the issue and enforce its judgment, or whether a defendant has

> ". . . certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notices of fair play and substantial justice.'" (Citing cases)

International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057.

It should be noted that appellant International was not brought in by service on Local 16. Its "Alaska representative," Verne Albright (Tr. 162, 273), was the person upon whom service was had to bring in the International. He was employed by the International to "service" and advise all of the locals of the International Longshoremen's and Warehousemen's Union in Alaska (Tr. 954). He made regular reports to the International at San Francisco (Tr. 956, 957). We will forbear further reference to Albright's status for this purpose, since further references to the activities of Albright elsewhere in this brief, as well as the facts here noted, amply sustain the service upon the International through him as an employee of the International who

> ". . . has such a relation to it that it could reasonably be expected that if served with process he would give notice of the suit to the association." *Operative Plasterers, etc., Ass'n v. Case,* 93 F. (2) 56, 67.

Nor does appellant International argue that Albright was not such a person.

That appellant International was amply and early advised of the service upon Albright is unquestioned; for "This service, as a matter of fact, did bring the brotherhood in, fighting." *Tunstall v. B. of L. F. & E.,* 148 F. (2) 403, 406. Pleadings were filed on the International's behalf in the name of its attorneys, as well as the attorney for the local in Juneau, within the time required of a diligent defendant.

But in addition, and conclusively against appellants, it is perfectly clear that appellants' demurrer raising the

question of lack of jurisdiction over the persons of the appellants *and* the subject of the action, constitute a general appearance by appellant International, as well as Local 16.

Despite the confusion in order in the Transcript of Record herein, and certain statements of questionable inference made by appellants in their "Jurisdictional Statement", all of which are pointed out in an earlier portion of this brief, the original record in this case will show that Verne Albright, the representative in Alaska for appellant International, was served October 20, 1948. On November 20, 1948, a general demurrer, only, was filed by both appellants (Tr. 15). That demurrer was argued December 31, 1948, and taken under advisement.

Then, on January 3, 1949, after filing of the general demurrer and argument thereon, appellants filed a special appearance and motion to quash service of summons, together with a motion for leave to withdraw their demurrer. In overruling the demurrer of appellants the Court also denied the special appearance and motion to quash and motion for leave to withdraw demurrer (Tr. 21, 22). It is, of course, within the discretion of the trial court whether a defendant will be relieved of the effect of a general appearance and allowed to appear specially for contesting jurisdiction over his person. *Brookings State Bank v. Federal Reserve Bank of San Francisco,* 291 F. 659.

Because appellants first filed a general demurrer in the court below, questioning not only the jurisdiction of the court over their persons but over the subject mat-

ter of the action, *United States v. Yakutat & S. Ry. Co.*, 2 Alaska Rep. 628, is decisive that they appeared generally in the cause and waived any objection to the court's jurisdiction. In that case an indictment was returned against the railway and a bench warrant of arrest issued. The railway attorneys appeared specially and moved to quash service on the ground that the court had no jurisdiction over defendant's person, and for the *further* reason that the offense charged in the indictment could not be committed by a corporation. In denying the motion to quash service, the court held that by attacking the subject matter of the indictment in its motion, the defendants had waived their jurisdictional objections and had made a general appearance.

See also *Dickey v. Turner,* 49 F. (2) 998, 1001, and *Chesapeake & Ohio Ry. Co. v. Coffey,* 37 F. (2) 320, 323. Since the rule above announced is uniform it is unnecessary to multiply authorities on the question.

It thus plainly appears that the validity of the service upon appellant International in this case was neither made easier nor possible only if the Alaska court was a "district court of the United States" within the meaning of the Act. The International could have been sued as an entity either in the federal courts or in a state court by reason of the fact that a federal right, of the same character as the treble damage section of the Sherman Act (15 U.S.C.A. § 15), was here an issue. *U. M. W. v. Coronado Coal Co., supra; Williams v. U. M. W., supra.* And service upon it elsewhere than in the state in which its headquarters were located was not dependent upon the status of the court, but upon the nature of its activi-

ties in the place in which it was summoned to appear before that court. The law on this point was not dependent on, but wholly independent of, the Act.

Nor is the reason far to seek. In conferring upon the federal courts the right to hear and decide breach of contract cases in Section 301 Congress was not dealing with a right conferred by federal law, but only making available to such suits the federal courts without the bars of diversity and jurisdictional amount. Thus the law of the district in which the court was located determined, absent the provisions of Section 301, whether the union could be sued as an entity. In such "common-law" suits, therefore, Congress provided that a union could be sued as an entity. But no such provision was necessary in Section 303(b). And since there was and is, as hereinabove noted, no question of service upon such entity in any district in which it is carrying on continuous activity of a character sufficient to subject it to the court's process, nothing further was added in this respect either in Section 301 or 303.

Thus, insofar as the International was concerned, no provision of the Act in question validated or invalidated the service of summons upon it, but the issue was solely determinable by the nature of its activities in Alaska and the status of its agent who was served. No argument is made, or could be, that the service was wanting in validity because of deficiency in either of these tests.

3. As to agency.

Nor did the court's rulings on agency depend for

validity on its status as a "district court of the United States" or "any other court having jurisdiction of the parties." For here, as in the preceding two points, appellants have mistaken the law. Section 301(e) simply says that in all cases under that Section the common-law rules of agency apply. Since a fuller discussion of the correctness of the lower court's rulings and instructions on agency is contained elsewhere in this brief, it is sufficient to say here that the agency rulings and instructions were based on the common-law rules which are the same, whichever of the two designations of Section 303(b) the court conceived for itself.

When the Act was before the Senate after conference, the Chairman of the Senate Labor and Public Welfare Committee and Chairman of the Conference Committee of the Senate, inserted in the Congressional Record a memorandum of the meaning of the language here considered. Because that statement is so conclusive upon the point it is worthy of reproduction here (2 Leg. Hist. 1622):

> "Section 2(2) to (13), and Section 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act, 'anyone acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in Section 2(13) and Section 301(e), since it is used throughout the unfair labor practice sections of Title 1 and in Sections 301 and 303 of Title 3. In defining the term the conference amendment reads, 'The question of whether the specific acts performed were actually authorized and subsequently ratified shall not be controlling.' *This restores the law of agency as it has been developed at common law.*

"These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employees for the acts of their managerial and supervisory personnel. Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.

"It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of the *United States v. United Brotherhood of Carpenters* placed upon Section 6 of the Norris-LaGuardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need to do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution disclaiming any such responsibility. *The conferees agreed that the ordinary law of agency should apply to employer and union representatives.* Consequently, when the supervisor acting in his capacity as such engages in intimidating conduct or illegal action with respect to employees or labor organizers, his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his action. Similarly, union business agents or stewards, acting in their capacity as union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct." (Emphasis supplied)

And this is, of course, exactly what the language of

the statute does. Norris-LaGuardia Act in Section 6 (29 U.S.C.A., Sec. 106) excepts the union's responsibility:

> ". . . except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 301(e) restores the common-law rule by providing:

> "(e) For the purposes of this action, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

For the vice of the Norris-LaGuardia Act, as the dissenting minority in the *Carpenters* case (330 U.S. 395) and the Congress saw it, was that no agent is ever actually authorized to commit an unlawful act, and after it has been committed and *actual* knowledge of it and its effect is obtained, no ratification could as a practical matter ever be shown.

Thus the common-law rule discussed ~~*supra*~~ *post* under Point III A of this brief, that the principal will be bound so long as the actions of his agent are within the general scope of the latter's employment, was restored. That rule is best expressed by the Supreme Court thus:

> "It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. (Citing cases)
>
> "And this is the rule when the act is done by the agent in the course of his employment, although done

> wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct." *New York Central & H. R. Railroad Co. v. United States,* 212 U.S. 493, 29 S. Ct. 304, 306.

Thus the real basis of the International's complaint here is not that the rulings as to the trial court's status deprived it of the benefit of the common-law rules of agency, which the court applied at the trial (see pages 76 to 83, appellee's brief), but that appellant did not have the benefit of the preferential rules of agency. But the International was entitled to no such preference, whichever status the Alaska court had. Whether it was a "district court of the United States" or "any other court having jurisdiction of the parties," it was bound either by the Act or the common law to apply, and did apply, the common-law rules of agency.

Appellants' suggest (Br. p. 79, footnote 43), however, that perhaps the district court below was bound to apply the restrictions of the Norris-LaGuardia Act respecting liability for an agent's acts because the Alaska court, being "any other court having jurisdiction of the parties," and thus not subject to the "limitations and provisions" of Section 301, was not freed of that Act's restrictions as were "Article III" courts.

In the first place, of course, appellants disregard the decision of this Court in the *Wirtz* case, *supra,* holding

that that Act inhibits "Article III" courts only, which concededly the court below is not. Thus, the Norris-LaGuardia Act and its restrictions on the common-law rule of agency are by that decision inapplicable to the Alaska court.

In addition, appellants' assumption that the "limitations and provisions" of Section 301 apply only to "Article III" courts seems clearly unfounded. Rather, those limitations and provisions apply equally to either "district courts of the United States" or "any other court having jurisdiction of the parties." If it were otherwise, as we have pointed out in Part II A 1 of this brief, the *restriction* that a money judgment issuing out of a federal court in the States would be enforceable only against the union treasury, would not be applicable to a judgment issuing from a State court or a territorial court, which would be enforced as well against the assets of all the union members. The only way to avoid this ridiculous anomaly, which was clearly not intended, is to construe the "limitations and provisions" of Section 301 to apply to both classes of courts mentioned in Section 303(b).

For the foregoing reasons appellants were not prejudiced in any way by the trial court's rulings in the three respects of jurisdiction, service or agency. Whether the Alaska court had the status of a "district court of the United States" or "any other court having jurisdiction of the parties," its rulings were required to be, and were, the same. Since a federal right was involved, appellants could be sued as entities in whatever court they were required to appear. And not the status of the court, but

the nature of the International's activities and the status of its resident representative as one who could be expected to see to it, as he did, that the International received notice of the suit, was in issue. And lastly, whatever status it occupied the court below was bound to, and did, apply the common-law rules of agency.

Between them the two designations of courts entitled to hear and decide a cause of action for damages on account of the activities described in Section 303(a), comprehended every status which the Alaska court could occupy. Appellants do not argue that the court below was not of the second class named in Section 303(b), but simply, that being so, they, and especially the International, should have had different rulings in respect to the three main points than if it had been the court first described in that subsection. But nowhere does the law bear out their contentions. Instead, where the issue involved was the cause of action created in Section 303, the rulings of the court on these issues could not have varied, whatever its status. Accordingly, no error whatever was committed by the trial court, prejudicial or otherwise, in this respect.

III.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY

A. There Was No Error in Giving the Instructions (Specifications of Error III(b), (d), (e) and (f)) of Which Appellants Complain.

1. Any error in instructions 6 and 7 and in supplementary instructions 3 and 4 would be harmless since there was no issue of liability for the jury.

Appellants' Specifications of Error III(b), (d), (e) and (f) deal with claimed errors in instructions 6 and 7 and in supplementary instructions 3 and 4. Each of these instructions dealt with the circumstances in which the jury might find the appellants liable to appellee. Since the evidence established conclusively that each of the appellants was liable to appellee, the court should have instructed the jury that there was no question of fact with respect to the issue of liability, as appellee requested (Tr. 1036). Accordingly, whether the instructions actually given were erroneous in any respect is a matter of only academic interest.

Paragraph VII of the second amended complaint charged both the appellants as follows:

> "From about April 10, 1948, until the present time *defendants* have unlawfully engaged in, and induced and encouraged plaintiff's employees at Juneau, Alaska, and employees of other employers, to engage in a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities of plain-

tiff, or to perform any services for plaintiff." (Tr. 5) (Emphasis supplied)

In paragraph VIII appellee charged:

> "An object of *defendants* in their activities described in paragraph VII above has been, and is, to force and require plaintiff to assign the work of loading its barges with its lumber to members of Local 16 rather than to other persons, including members of Local M-271, to whom said work has heretofore been assigned. Neither of said defendants has been certified by the National Labor Relations Board as the bargaining representative for employees performing such work." (Tr. 5, 6) (Emphasis supplied)

The necessary elements to establish liability against appellants were:

1. That appellants engaged in, or induced plaintiff's employees or employees of other employers to engage in concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities of plaintiff or to perform any services for plaintiff.

2. That an object of appellants was to force and require appellee to assign the work of loading its barges to members of Local 16, rather than to other persons.

It was conceded at the trial that the Company had assigned the barge loading work to its mill employees; that Local 16 attempted to induce appellee to assign the work to its members; that on April 10, 1948, when appellee refused to comply with the demands of Local 16, it placed pickets at appellee's plant and induced appellee's employees to respect the picket line (Tr. 835, 855,

864). Substantially similar admissions were contained in the answer of the Local (Tr. 26 and 27). As a result, appellee's mill was compelled to close (Tr. 411). Thus there was no issue as to the liability of the Local.

Neither was there an issue for the jury as to the participation of the International. That agents of the International had worked to induce both appellee's employees and employees of other employers to refuse to handle appellee's products was shown by an abundance of uncontradicted and convincing evidence. It was also clear that the object of this activity was to force appellee to assign the work of loading barges to members of the Local. One of the earliest demands upon appellee for all the work "from the bull rail out," which included barge loading, was made by Mr. Albright, International representative of I. L. W. U. for Alaska (Tr. 162-167).

Under the pretext that it was customary practice all along the coast, further demands were made for additional work in October, 1947, by Germain Bulcke, International Vice President of I. L. W. U. (Tr. 574). The reason for the interest of the International was the belief that if barge loading was permitted by mill employees it would set a precedent for other ports (Tr. 424, 425, 426, 781, 965, Plaintiff's Ex. 17).

Mr. Albright was representative of the International for the Territory of Alaska (Tr. 273). Appellants' own testimony established that Albright's duties, as representative for the International, consisted of assisting and advising all of the locals in Alaska (Tr. 954). It was his duty to assist in labor relations and negotiations between I. L. W. U. locals in Alaska and employers, to provide service to I. L. W. U. locals in Alaska in the sense of advising them on labor relations matters and other problems they might have (Plaintiff's Ex. 19).

Mr. Albright came to Juneau in early May, 1948, pursuant to that employment, to assist Local 16 in its dispute with appellee (Tr. 946-947). From that time forward Albright acted as a leader of the activities of the local (Tr. 974-984) . During the period in which he was assisting the local, Albright made regular reports with respect to the progress of the dispute at Juneau to the International (Tr. 956-957). Albright remained on the payroll of the International (Tr. 954). Albright made numerous efforts to persuade appellee's employees to refuse to work (Tr. 957-984). Thus it was established that while acting within the scope of his employment by the International and doing the very things that he was hired to do, Albright performed unlawful acts of which appellee complained.

Albright's testimony that he was acting for Local 16 while in Juneau does not raise an issue of fact as to whether he was acting within the scope of his employment with the International, in view of his testimony that it was his job to aid and assist the locals.

In addition to the activities of Mr. Albright the evidence established specifically, and without contradiction, that the International, through its vice president, Germain Bulcke, instructed all Canadian locals that appellee's products were unfair and this information was disseminated among the membership through the official I. L. W. U. newspaper (Plaintiff's Ex. 24; Tr. 973-979). The International, through its Canadian representative, John Berry, instructed Local 505 at Prince Rupert, not to handle appellee's products (Tr. 620-21; 624-27). This instruction was given pursuant to information received by Mr. Berry from his San Francisco office (Tr. 621). As a result the Canadian longshoremen refused to unload appellee's lumber in Canadian ports (Tr. 611-633). The attitude and participation of both defendants remained unchanged even at the time of the trial. Members of Local 16 continued their picketing (Tr. 411), and on May 2, 1949, while the trial was in progress, John Berry, acting on orders received from his headquarters in San Francisco, again refused to permit lumber to be unloaded in Prince Rupert, despite the ruling by the National Labor Relations Board that Local 16 was not entitled to the work of loading appellee's barges (Tr. 626).

Aside from this direct evidence, there was circumstantial evidence of a convincing character that Local 16 received the active aid and assistance of the International in its unlawful activities. Repeated threats that barges loaded by sawmill workers would be followed (Tr. 763) and would not be unloaded in Canada or the United States (Tr. 221, 299, 444) proved to be well founded in fact. When a barge load of lumber, shipped in August, 1948, arrived at Prince Rupert, the longshoremen there refused to unload it on orders from Mr. Berry (Tr. 621). Appellants succeeded in unloading the barge at Tacoma, which was one of the few Pacific Coast ports not controlled by the I. L. W. U. (Tr. 687, 274). But a second barge sent to Tacoma in September, 1948, remained in Tacoma for over six months and was not unloaded until during the course of the trial (Tr. 437-438, 687).

Aside from Mr. Albright, who was subpoenaed by the appellee to attend the trial (Tr. 275), appellants failed to produce any witness to deny or explain the interest of the International or the activities of Mr. Berry or Mr. Bulcke. Appellants also failed to produce or offer any correspondence or reports which might disclose a lack of participation by the International. Albright denied having any such records and said there were no such records in Alaska (Tr. 277-78).

It is the rule that every party to a concerted endeavor or conspiracy is deemed in law a party to all acts committed either before or after his entrance into the concerted activity by any other party in furtherance of the common design. *Silliman v. Dobner,* 165 Minn. 87, 205 N.W. 696; *Patch Manufacturing Co. v. Protective Lodge,* 77 Vt. 294, 60 Atl. 74. Thus, even if it could be argued that the International was not acting in concert with the local from the very outset of the dispute with appellee, the International would, nonetheless, be liable for the whole of the damage which appellee suffered because of its subsequent concerted action with the local.

The evidence outlined above was not contradicted by the appellants in any way and was of a persuasive and convincing character. It established conclusively the allegations of appellee's complaint against both appellants insofar as concerned the issue of liability. Since a reasonable juror could not have disbelieved the evidence, the court would have been justified in submitting only the issue of damages to the jury. *Town of Orleans v. Platt,* 99 U.S. 676. Accordingly, any errors of language which may have been used by the court in submitting the issues other than damages, were nonprejudicial and harmless error.[55] Since a harmless error is not a reversible error, the Court need not scrutinize instructions 6 and 7 and supplementary instructions 3 and 4 for error. Actually, however, the instructions were correct and proper.

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[55] *W. B. Grimes Dry-Goods Co. v. Malcolm,* 58 Fed. 670-672 (C.C.A. 8th), 164 U.S. 483, 17 Sup. Ct. 158; *Hinds v. Keith,* 57 Fed. 10-15 (C.C.A. 5th); *New York N. H. & H. R. Co. v. O'Leary,* 93 Fed. 737-742 (C.C.A. 1st).

2. The instructions given were proper.

Appellants' statement that before the International could be found liable the evidence had to show that the International's agents engaged in unlawful activities (Br. 82) is correct. Throughout appellants' entire argument appellants have overlooked completely the abundance of evidence, outlined above, that the agents of the International, acting in concert with agents of the Local, did engage in unlawful activities as charged in appellee's complaint. This oversight pervades and nullifies nearly every contention which appellants make.

Instructions 6 and 7

In instruction 4 the court told the jury that the International would be bound only by acts performed by its agents while acting in the scope of their employment. The court pointed out that it was undisputed that Bulcke, Berry and Albright were agents of the International, but left it to the jury to say whether such persons were acting within the scope of their employment while performing any unlawful acts which might be established by the evidence (Tr. 49-50). Appellants concede that the instruction correctly stated the law of agency except in a particular not here material.[56]

In instructions 6 and 7[57] the court informed the jury of the nature of joint liability. It explained that if the two appellants, *through agents who acted within the*

[56]See pages 78 to 82.

[57]Set forth in appellants' brief at pages 18 to 20 and in the transcript of the record at pages 51 to 53.

scope of their employment, entered into a conspiracy or understanding to commit the acts of which plaintiff complained, or acted jointly or in pursuance of a common design or purpose, then the acts of the agents of either appellant in furtherance of the conspiracy or understanding would be binding upon both appellants. If one appellant directed, advised, encouraged, procured, instigated, promoted, or aided or abetted wrongful acts of the other, the appellants would be jointly liable for the whole of the damage thereafter sustained by appellee.

Appellants did not except to instructions 6 and 7 on the ground that they incorrectly stated the law nor on the ground that there was not sufficient evidence to warrant giving the instructions. It may not be disputed that the act of one of several conspirators or joint venturers, after the formation and during the existence of the conspiracy or venture, is attributable to all. *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.,* 73 F. (2) 333 (C.C.A. 6th). And each party to a general plan is jointly and severally liable for all damage resulting from the conspiracy. *Lewis v. Ingram,* 57 F. (2) 463 (C.C.A. 10th), *cert. den.* 287 U.S. 614, 53 S. Ct. 16. Each party to the concerted action is vicariously liable for the acts committed by his co-venturers, just as a principal is liable for acts of his agents within the scope of their employment. Prosser, Torts, states at page 1094:

> "The original meaning of a 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result. In such a case there was a com-

mon purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that 'all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.' Each was therefore liable for the entire damage done, although one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons. All might be joined as defendants in the same action at law, and since each was liable for all, the jury would not be permitted to apportion the damages. . . .

"This principle, somewhat extended beyond its original scope, is still law. All those who actively participate in a tortious act, by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a tacit one. . . .

"It is in connection with such vicarious liability that the word conspiracy is often used . . ."

It was on the theory that each of appellants, acting in concert, performed unlawful acts for which each ~~were~~ was jointly liable that appellee tried its case. As shown above there was ample evidence that the appellants worked jointly to force appellee to assign the work of loading barges to members of Local 16. Appellee was entitled to have its theory of the case submitted to the jury.

As the trial court pointed out, appellee might have proceded on the additional theory that each of appellants acted independently of each other in wronging appellee (Tr. 1045). Under such theory the International might have been held and the Local absolved. Appellee did not proceed on this theory because the

evidence so overwhelmingly indicated that the appellants acted jointly. Appellants cannot complain that the instructions of the court permitted the jury to hold the International without also holding the Local, since the jury indicated by its verdict against both appellants that it considered the appellants jointly responsible.

Appellants urged only two objections to instruction 6 at the trial:

(1) The reference to a conspiracy was improper under the pleadings (Tr. 1053): and

(2) Under the terms of the instructions the International could be found liable and the Local absolved (Tr. 1055).

Although appellants' argument is not entirely clear, appellants appear now to assert for the first time that instruction 6 should have contained a warning that the acts of Verne Albright would not bind the International unless Albright was acting within the scope of his employment as an agent for the International while performing such acts. If this be appellants' position, appellants should have so stated at the time they excepted to instruction 6 in order that the court might have had an opportunity to consider modifying its instructions. It is well settled that a party may not urge on appeal an error in an instruction unless he excepts thereto at the trial and states distinctly the grounds of his objection. *McNitt v. Turner,* 83 U.S. 352; *Pacific Telephone & Telegraph Co. v. Hoffman,* 208 F. 221, 228 (C.C.A. 9th); *Novick v. Gouldsberry,* 173 F. (2) 496, 500 (C.C.A. 9th).

Instruction 6 was proper in any event. Appellants concede that instruction 4 contained an accurate statement of the common law rules of agency (Br. 82). In the second paragraph of instruction 6 the court reminded the jury that appellants were responsible only for the acts of their agents "acting within the scope of their employment." In addition, in instruction 14 the court cautioned that all of its instructions were to be considered as a whole. Thus the jury could not have been misled.

The only criticism of instruction 6 contained in appellants' brief which was also urged during the trial is that the complaint did not charge appellants with conspiracy (Br. 87). In their argument appellants assume that under the pleadings the International is charged only with responsibility for acts performed by its own agents (Br. 87). Paragraphs VII and VIII of appellee's complaint, however, clearly charge both appellants jointly with unlawful activity (see page 68, *supra*). Furthermore, paragraph IX charges that both appellants are responsible for the whole of the damage sustained by appellee (Tr. 6). Thus, appellants have at all times been on notice that they were charged with a joint tort.

There is no uncertainty in the word "conspiracy." Black's Law Dictionary (3d ed.) defines the word to mean "a combination or confederacy between two or more persons formed for the purpose of committing, *by their joint efforts,* some unlawful . . . act . . ." (Emphasis supplied). See also *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75 N.E. 877. It is not necessary for a plaintiff to allege

the combination in his pleadings in order to rely upon it. In 15 C.J.S. 1037 it is stated:

> "The conspiracy, not being the gravamen or gist of the action, . . . an allegation of the conspiracy does not in and of itself allege a cause of action, and, ordinarily it need not be alleged in order to impose liability for the wrong on all who have conspired to commit it . . ."

See also *Dickson v. Young,* 202 Iowa 378, 210 N.W. 452.

Appellants were free in advance of trial to use the devices provided by the Alaska rules of procedure to ascertain the evidence upon which appellee relied in support of its charge. All through the trial appellee's efforts were directed toward proving that the trouble in Juneau was merely part of a coastwise effort of the International to control all loading of vessels. For example, appellee's witness Flint testified that a settlement proposed on one occasion fell through because Albright feared its effect on a dispute at another port (Tr. 426). Some of the earliest demands that appellee assign the work of loading barges to the Local were made by Albright and the International's vice president, Bulcke. Appellee's evidence that Albright and an officer of the Local went to Prince Rupert shortly before the Local there refused to unload a barge should have advised appellants further that appellee contended they were working to enforce a program agreed upon between the two unions (Tr. 787-788). The same can be said of the evidence that the refusal of the Canadian locals to handle appellee's lumber was pursuant to orders direct from San Francisco (Tr. 621).

Instructions 6 and 7 correctly informed the jury that if it found that the appellants acted in pursuance of a common design, each would be responsible for the whole of the resulting injury, whether or not the whole injury could be attributed directly to the activity of the particular appellant. Appellants presumably knew this to be the law and cannot complain that they did not have adequate opportunity to meet appellee's evidence.

Appellants did not except to instruction 7 at the trial and are precluded from now asserting that the instruction was improper. In instruction 7 the court charged that one who directs, advises, promotes, aids or abets *a wrongful act* by another is as responsible therefor as the one who commits the act. Appellants argue (Br. 86) that the court's statement was broad enough to permit the jury to hold the International on the basis of Albright's assistance to the Local "in settling the dispute." There was no evidence of any efforts of Albright to settle the dispute except those efforts designed to compel appellee to submit to the Local's demands. If it is to these efforts to "settle the dispute" that appellants refer, their statement is undoubtedly correct for such efforts constituted wrongful acts. In such event, however, appellants' argument suggests no valid ground for holding the instruction improper.

Perry Norvell Co., 80 N.L.R.B. 225, upon which appellants rely (Br. 87-90) has no bearing whatever upon the issues with respect to instructions 6 and 7. In that case a local union was conducting a strike which the Board held to be a lawful strike. The Board found that

incidental to the strike certain members of the local engaged in unlawful attempts to coerce and intimidate their fellow employees. The members of the local were held to be agents of the local, but not of United, the national union involved. The national union was clearly involved in the strike which was a lawful activity. The Board found, however, that the national union had nothing whatever to do with the unlawful acts of members of the local incidental to the lawful strike:

> " . . . the record is barren of any evidence that any representative of United incited, committed, participated in, or even observed or knew of any of the acts of restraint or coercion which we have found were committed." 80 N.L.R.B. 247.

There was no such failure of proof with respect to the International in the present case. There was ample evidence that the International's agents Berry, Bulcke and Albright each participated in the unlawful acts charged in appellee's complaint. In these circumstances it was proper for the court to submit to the jury the issue of whether the International was responsible jointly with the local for the entire damage resulting from the unlawful activities of both appellants because of acts committed by the International's own agents.

Since in the *Norvell* case the combination of unions was for a lawful purpose, by definition no "conspiracy" was involved (see page 19, *supra*). When a combination is innocent in its inception but is afterwards perverted to unlawful ends, only those participating in the perversion are conspirators. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union,* 165 Ind. 421, 75

N.E. 877. Because in the present case the purpose of the combination between appellants was unlawful, appellants are responsible as conspirators.

Supplementary Instructions 2 and 3

After the jury had deliberated for some time it requested supplementary instructions. As part of supplementary instruction 2 the court told the jury that the evidence was undisputed that members of the Local engaged in the activity charged in appellee's complaint. Appellants do not challenge the accuracy of this statement.

The court then added:

> "The only issues which remain for your consideration are whether damages proximately resulted from such concerted refusal and whether the International engaged in this concerted refusal to transport or otherwise handle or work on lumber of plaintiff or to perform any services for plaintiff. . . . ."

The effect of the quoted portion of the instruction was to remove from the consideration of the jury the question of whether the Local had engaged in the unlawful activity of which appellee complained, but to leave the question open as to the International.

In supplemental instruction 3[58] the court explained that appellants would be responsible for deeds performed by their agents while acting beyond the scope of their employment if appellants thereafter ratified such acts.

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[58]Set forth in appellants' brief, pages 22 and 23, and in the transcript of record, pages 1101 and 1102.

Consistently with instruction 2 the court told the jury, in effect, that by engaging in the concerted refusal the Local ratified the acts of its agents and that the issue of ratification was applicable only to the International.

Appellants contend that instruction 3 removed from the consideration of the jury the issue of whether damages proximately resulted from the unlawful conduct of the Local. However, appellants took no exception on this ground at the trial. Consideration of the portion of supplementary instruction 3 of which appellants complain in context with the remainder of the instruction, with supplementary instruction 2 (Tr. 1100-1101) and with instructions 8[59] and 9[60] (Tr. 53-54), makes clear the intent of the court to leave open the issue of damages. The court submitted its instructions in writing. It warned the jury not to single out one particular instruction and consider it by itself or separately from or to the exclusion of all the other instructions (instruction 14, Tr. 57). Thus the jury could not have been misled by supplementary instruction 3.

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[59]Instruction 8:

"No. 8

"If you should find that plaintiff is entitled to recover against the defendants or either of them, it will then become your duty to assess the amount of damages which plaintiff may have sustained. In such event your verdict should be in such amount as will fairly and reasonably compensate the plaintiff for the damage which it has sustained and which was proximately caused by the acts complained of, including any loss of profits which it is reasonably certain plaintiff would have received but for such acts."

[60]Instruction 9:

"No. 9

"By proximate cause is meant the probable and direct cause. It is the cause that sets in motion or operation another or other causes and thus produces the injury and without which the injury would not have occurred."

Supplementary Instruction 4

Appellants object to the following portion of supplementary instruction 4:

> "Ordinarily the question whether a certain act is within the scope of employment of an agent of a labor union arises only where the act itself appears to be foreign to or bear but a slight relationship to the employment itself as where, for example, one engaged in picketing injures a person attempting to cross the picket line or damages property. Here the acts alleged are not of that kind." (Tr. 1102)

Appellants contend that the quoted portion of the instruction removed from the consideration of the jury the issue of whether the activities of Albright at Juneau were within the scope of his employment as an agent of the International.

By stating that, "Here the acts alleged are not of that kind," the court meant only to inform the jury that no acts of violence were charged. If appellants considered the statement to mean something different, they should have pointed out the ambiguity to the court at the time of trial in order that the court might correct it. Appellants excepted to the instruction only on general grounds (Tr. 1060).

In any event, the instruction did not, as claimed by appellants, direct the jury to find that everything done by Albright was within the scope of his employment by the International. This was specifically left as an issue for the jury to determine not only by supplementary instruction 4 but by other instructions. Even under appellants' interpretation the most that the instruction did

was to say that the acts in question did not appear to be foreign to or to bear but slight relationship to the employment. Since appellants conceded that it was Albright's duty, as International representative, to advise and assist locals, the instruction fitted the evidence perfectly.

The court qualified its remarks by stating that "ordinarily" the question of whether an act is within the scope of the employment of an agent depends upon whether it appears to be foreign to or bear but a slight relationship to the employment itself. By using the word "ordinarily" the court left open consideration of appellants' contention (not supported by the evidence) that in assisting and advising the Local in Juneau, Albright was not in this particular instance acting in the course of his employment by the International.

B. Appellants' Proposed Instructions on General Policies of the Act Were Properly Refused (Appellants' Specification of Error 3(g) and (i)).

Appellants argue in Part III(b) of their brief that appellee acted unreasonably in refusing to live up to a commitment it made to give its work to appellants' members, retreating behind its contract in justification of its refusal (Br. 94-98); and hence that they were entitled to the instructions here in question.

In this concept appellants incorrectly imply that a commitment to give appellants the work was made after appellee had contracted with the I. W. A. This is not correct. The conversation referred to was had some

months prior to the I. W. A. contract, and hence some months prior to I. W. A.'s conclusion that its recognition clause could and would include barge loading by yard employees (Tr. 181, 182). The alleged "agreement" between appellants and I. W. A. was not made until long after appellee had contracted with I. W. A. and had informed appellants that it would not accede to their demands.

Appellants quote from Evans' testimony to support their assertion that appellee was refusing to discuss the matter, much less bargain on it, and hence acting unreasonably. Of course, appellee had no right to bargain with appellants, who represented none of its employees. But Evans wrongly conceived, as do appellants, that appellee's assignment of work and its recognition of I. W. A. were of no significance, its duty being to stand neutral until I. W. A. and appellants reached a settlement, then accept it (Tr. 990, 993).

Two of the instructions proposed by appellants (Nos. 1 and 13) (Tr. pp. 34-36 and 43, 44) disclose on their face that they are taken from the "Statement of Policy" in Title I, the National Labor Relations Act, and the "Statement of Policy" in Title II, relating to the creation and duties of the Federal Mediation and Conciliation Service. As such, they simply proclaim the reasons for the provisions which follow. And as such they are nothing but abstract principles of law, unrelated to the complaint or evidence in this case. Numbers 1 and 13 of the proposed instructions were thus properly refused. *Irvine v. Irvine,* 76 U.S. 617, 19 L. Ed. 800; *Howard v. Capital Transit Co.,* 163 F. (2) 910, 912.

Requested instruction No. 12 refers to Section 204 of Title II, relating to good-faith bargaining between employers and employees or their representatives and disputes over contract terms, and hence is inapplicable here since it is in no sense a statement that employers and employees (which appellants concededly were not) should violate legal obligations to maintain industrial tranquillity.

Appellants' requested instruction No. 2 would have conveyed to the jury a double falsehood concerning the law and the facts applicable to this case. First, the reference to "demands" by I. W. A. was not in accord with the evidence. The I. W. A. had "demanded" that appellee turn over the work of loading its barges to the longshoremen only in the sense that a person placed in fear of his life "demands" that the thief take his pocketbook and watch. The barge-loading was a comparatively small part of the work and the jobs of more than 260 men were at stake. The I. W. A. "agreed" that the longshoremen should load appellee's barges because they feared the mill would be shut down and they would lose their jobs (Tr. 484); because they wished to avoid trouble (Tr. 829); because they feared violence if they should go through the picket line threatened by the longshoremen (Tr. 873); because they feared the effect of being blacklisted (Tr. 848); and because they were deceived by appellants into the belief that the longshoremen were also employees of appellee and entitled to the work (Tr. 407).

Second, the instruction would have conveyed to the jury the false concept that appellee had some duty, ex-

press or implied, to accede to the "agreement" of the I. W. A. that longshoremen thereafter load appellee's barges. Appellants concededly represented none of appellee's employees (Tr. 192, 298). They were simply outsiders unconnected with the employment relationship dealt with in the Wagner Act, as amended, seeking to intrude themselves between appellee and their brother C. I. O. union, the I. W. A., and take work away from the latter. Thus not only had appellee no duty to bargain with appellants, but it would have violated the provisions of Section 9(a) of the Wagner Act, as amended, in doing so, and if it had adhered to the early "agreement" entered into by the I. W. A. and the longshoremen in the circumstances above described, and thus displaced its I. W. A. employees with longshoremen, it would in addition have violated Section 8(a)(3) of the Wagner Act, as amended, by discriminating against its own employees because of their nonmembership in I. L. W. U.

Appellants' contention that the instruction was proper for the jury to consider in mitigation of damages is unsound for the same reasons. Moreover, the proposed instruction said nothing of mitigation of damages but would have required a defendants' verdict if applied by the jury.

Appellants say in effect that appellee was bound to violate the law, as well as breach its contract with I. W. A., in order to reach a "peaceful settlement," by which they meant outright surrender to their demands. The cases cited by appellants on mitigating damages have no reference to these circumstances. The duty to

act reasonably in not increasing the damages caused by another's wrong, referred to under Section IV of this brief, does not include the foregoing of contractual rights, and especially does not require that one violate the law. *Missouri Pacific Ry. Co. v. Baker,* 64 S.W. (2) 321 (Ark. 1933); *J. M. Huber Petroleum Co. v. Yake,* 121 S.W. (2) 670 (Texas 1938).

The cases cited by appellants (Br. 99-101) were founded on breach of contracts between employers and longshoremen and are distinguishable for that reason. There the employers could accede to the demands of the unions while awaiting a decision without prejudicing either their own rights or the rights of others. Appellee was in no similar position. Appellants were not agents of any of appellee's employees. The rule contended for by appellants would, in fact, if followed here, write the National Labor Relations Act out of existence, for that Act requires an employer to negotiate with representatives of his employees, and if agreement is reached, contract with them. If an employer, in order to minimize damages, were required to contract with a union concededly representing *none* of his employees, especially when he already had contracted with one representing a majority of all of them, the entire foundation of collective bargaining under the Wagner Act, as amended, would fall.

C. The Court Did Not Err in Failing to Instruct the Jury Concerning Section 8(c) of the Wagner Act.

In appellants' Specification of Error 3(j) it is as-

serted that the court should have given their requested instruction concerning Section 8(c) of the National Labor Relations Act, which provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of *an unfair labor practice* under any of the provisions of *this Act,* if such expression contains no threat of reprisal or force or promise of benefit." (Emphasis supplied)

As a matter of fact appellants made no request for such an instruction (Tr. 34-45). The only reference in the record to Section 8(c) is the following, quoted from appellants' exceptions to the court's supplementary instructions:

> "Also, we object in so far as it relates to the International, that the question of the quantum of evidence necessary to prove principal and agency in order to hold the principal liable, is not adequately or properly set forth. The same objection we make to Instruction No. 3, that is with respect to the law applicable to proving principal and agent, and with respect to the word 'ratification' in the instructions. We again call attention to 8(c) of the Act upon which an instruction was requested, and which should have been embodied in that instruction. The same objection that we make to No. 3 we make to No. 4. It over-simplifies the possibility of settling responsibility on the International, with respect to the absence of quantum of proof to prove agency." (Tr. 1059, 1060)

This was not the equivalent of a requested instruction as shown by Section 57-7-61, Alaska Compiled Laws Annotated, which provides:

"Each party shall prepare and submit such instructions as he deems material to the case . . ."

The suggestion that Section 8(c) should have been incorporated in the court's supplementary instructions 3 and 4 is untenable. These instructions dealt with the subjects of scope of employment and authority of agents and ratification of their acts. The reference to the provisions of Section 8(c) in this connection would have been meaningless.

The nearest approach which we can find in the record to a request that the court instruct concerning the terms of Section 8(c), is appellants' requested instruction No. 5 (Tr. 37). But this would clearly have been an improper instruction. This Court has rejected the contention now advanced by appellants that picketing, for whatever purpose, is protected under this Act or the Constitution. In *Printing Specialties, etc., Union v. LeBaron,* 171 F. (2) 331, 334 (C.C.A. 9, 1949), this Court, in speaking of that section, said:

> "The section is inapplicable. Cf. United Brotherhood of Carpenters & Joiners of America v. Sperry, 10 Cir., 1948, 170 F. 2d 863. It is known to all the world that picketing may comprehend something other than a mere expression of views, argument or opinion. As conducted here it constituted an appeal for solidarity of a nature implying both a promise of benefit and a threat of reprisal. The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly

> a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

The statement in requested instruction No. 5 that there must be additional evidence that picketing was accompanied by acts of coercion or intimidation which caused appellee's employees to go through the picket line, finds no support in the statutes, in the Constitution or at common law.

There are other unsurmountable reasons why the court should not have instructed concerning Section 8(c) even if requested to do so in the manner provided by law. The italicized portion of Section 8(c) quoted above shows that its application is limited to "this Act," which means the "National Labor Relations Act" (Sec. 17). An "unfair labor practice" was in no way involved here. That is a charge for the Board, or the courts at the request of the Board, under the National Labor Relations Act. *Schatte v. International Alliance, etc.,* 182 F. (2) 158, 166 (C.C.A. 9, 1950). Thus an instruction concerning Section 8(c) would simply have promulgated one of appellants' erroneous conceptions of the Act hereinbefore mentioned. As pointed out in Part I of this brief, a suit for damages under Section 303 is not in any way affected or controlled by the substantive or procedural aspects of Title I of the Wagner Act. Section 8(c) of that Act relates only to proceedings before the National Labor Relations Board.

Moreover, Section 8(c) is not applicable, even in a Board proceeding under Title I, if the acts in question contain a "threat of reprisal or force or promise of benefit." The activities of the International which establish its liability were of this character. To paraphrase the language of this Court in *Printing Specialties, etc. Union v. LeBaron, supra,* one must be naive indeed to assume that the dissemination of the information in the "Dispatcher" that appellee's products were unfair was simply an exercise of the right of communication. Appellants do not deny having made the statements that appellee's lumber would not be unloaded (Tr. 444). They concede that Canadian longshoremen would not unload the lumber (Tr. 979). They did not offer any evidence to rebut appellee's showing that it could not unload its lumber anywhere on the Pacific Coast. The device by which this objective of appellants was accomplished was communication from both appellants to other locals in Pacific Coast ports, nearly all of which are controlled by appellant International,[61] that appellee's products were "unfair." In the setting of this controversy a reading of Section 8(c) of the Act would not have stated the law, even under Title I of the Act, to which it is alone applicable.

The case of *Grauman Co.,* 87 N.L.R.B. No. 136 (1949), relied upon by appellants, actually supports appellee's position. The Board there held that placing a *primary employer* on an unfair list would not amount to an unfair labor practice *in the absence of an intention*

[61]See list of ports contained *In The Matter of the Shipowners' Association of the Pacific Coast* (covering all west coast ports in the United States) 7 N.L.R.B. 1002, 1004.

by so doing to induce the employees of others not to work. Conversely, if the unfair list had such a purpose, it would be unlawful even as to a primary employer. The case therefore stands for the proposition that an unfair list, with an unlawful object, is enough to constitute an unfair labor practice regardless of the provisions of Section 8(c).

Here appellee was not the primary employer, or any other kind of an employer, insofar as concerned appellants. And the notification to Canadian locals that appellee's products were unfair was meaningless except as a means of inducing those locals not to work on appellee's products. This was an unlawful purpose.

IV.

THE TRIAL COURT'S RULINGS ON EVIDENCE DID NOT RESULT IN PREJUDICIAL ERROR TO APPELLANTS

A. The Court Below Was Right in Its Rulings on the Hearsay Objections.

This specification of error concerns the testimony of Freeman Schultz, a director and the manager of the appellee, concerning investigations made to determine the possibilities of getting appellee's lumber unloaded at various Puget Sound and Canadian ports (Tr. 692-696). Mr. Schultz made one trip himself, and relied upon the reports of his agents, whom he identified in his testimony, for the balance of his knowledge. Based upon

this information, he testified that Tacoma and Seattle were the only Puget Sound ports with adequate facilities for distributing the company's lumber, and that the lumber could not be unloaded at either of these cities or at Prince Rupert, British Columbia. He also testified that the company actually sent a tug and barge to Seattle, but was not successful in getting it unloaded.

Appellants objected to the admission of this testimony as conclusion, opinion and hearsay. The trial court excluded testimony with respect to what a company tugboat captain was told when he attempted to dock appellee's barges in Seattle, but admitted the balance of the evidence. Appellants assert that the trial court erred in the admission of this testimony because it was hearsay.

Mr. Schultz's testimony concerning information supplied by company agents to the effect that appellee could not get its lumber unloaded is termed hearsay by the appellants because the information was based upon investigations made by others. Appellants argue at pages 104 and 105 in their brief that the introduction of this testimony was prejudicial. Their brief states that the trial court recognized a duty of the appellee to mitigate damages (Tr. 719), and that appellee advanced inability to ship lumber as the reason for the closing of its mill. Therefore, appellants argue, the question of whether appellee was foreclosed from shipping was material to the jury's consideration of whether appellee had taken all reasonable steps to reduce its losses.

1. The trial court did not err in the admission of the testimony in question.

Appellee does not question appellants' assertion that it had a duty to mitigate damages. Consequently it had a right to show that it had made a reasonable effort to do so. This duty to mitigate damages, however, is a limited one. It is based upon the mores of decent human conduct, and does not require a plaintiff to explore every conceivable possibility of minimizing losses. "The efforts which the injured party must make to avoid the consequences of the wrongful act or omission need only be reasonable under the circumstances of the particular case, . . ." *Rathbone, Hair & Ridgway Co. v. Williams,* 59 F. Supp. 1, 4 (U.S.D.C.S.C. 1945). The sensible requirement that a plaintiff mitigate damages does not obscure the fact that it was the defendants who committed the wrong.

Professor McCormick aptly summarizes the scope of the duty to mitigate damages in his handbook, *McCormick on Damages,* at page 133. He states:

> "While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself,

> the person whose wrong forced the choice cannot complain that one rather than the other is chosen. Sometimes a reasonable man might consider that either active efforts to avoid damages or a passive awaiting of developments are equally reasonable courses. If so, a failure to act would not be penalized by the rule of avoidable consequences, even though it later appears that activity would have reduced the loss. It should not be assumed that only one course of conduct could reasonably have been chosen by the party wronged."

An injured party need not spend considerable money in doubtful attempts to minimize damages. *American Railway Express Co. v. Judd,* 104 So. 418 (Ala. 1925). He may recover if he acts reasonably even though greater exertions or knowledge on his part might have avoided the loss altogether. *Lovejoy v. Town of Darien,* 41 A. (2) 98 (Conn., 1945). "The duty does not extend to the necessity of going to extraordinary or unusual lengths to mitigate damages." *Scott's Valley Fruit Exchange v. Growers Refrigeration Co.,* 184 P. (2) 183 (Calif. 1947). Accordingly, the only duty imposed upon appellee was one of reasonable conduct under the particular circumstances.

Therefore, the truth of the matter asserted in the information supplied to Freeman Schultz by company agents was not in issue. It was not incumbent upon the company to justify the closing of its plant by a showing that it had absolutely no possibility of shipping its lumber. It was only necessary for the appellee to show that the shutdown of the mill was reasonable under the circumstances. Testimony, which was not excepted to, showed that the company had reason to believe that it

could not ship. Lumber piled up at the mill docks, and appellee made efforts to increase its storage facilities (Tr. 696). Appellants' representatives made statements that company lumber would not be loaded (Tr. 281, 285, 287) or unloaded below (Tr. 221, 299, 443, 444). The company shipped a barge of lumber which was not unloaded at Prince Rupert or Tacoma (Tr. 436, 437, 438).

The testimony in question was offered for the purpose of showing, and did show, that despite these circumstances appellee, through the offices of its general manager, Mr. Schultz, conducted a further investigation of the possibilities of getting its lumber unloaded. Mr. Schultz made one trip himself. He commissioned responsible men, a company attorney in Portland, an employee of the State Steamship Co., and the Seattle District Manager for the State Steamship Company, to ascertain additional facts with respect to Puget Sound ports. He obtained similar information from the Building Supervisor for the Dominion Government with regard to the possibility of unloading company lumber in Canada. Mr. Schultz's informants were identified in the testimony, so that a jury could conclude that they were responsible men whose word could reasonably be relied upon by the appellee (Tr. 693, 694, 611). Accordingly, this testimony tended to establish reasonable conduct by the company irrespective of the truth or falsity of the information supplied to Mr. Schultz. It shows that the appellee conducted an investigation; received information from responsible sources: and acted in reliance upon it, thus satisfying its duty to mitigate damages.

Extrajudicial statements are admissible where the truth of the matter asserted is not in issue. *Cannon v. Chadwell,* 150 S.W. (2) 710 (Tenn. 1941); *In re Thomasson's Estate,* 148 S.W. (2) 757 (Mo. 1941); *Wagner v. Wagner,* 43 A. (2) 912 (Pa. 1945). In *Wigmore on Evidence,* Vol. VI at pages 177 and 178, Professor Wigmore states:

> "The theory of the Hearsay rule (ante, Sec. 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, *but without reference to the truth of the matter asserted,* the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule."

Knowledge, belief, good faith, reasonableness or diligence on the part of a person may also be evidenced by extrajudicial statements. See Vol. VI, *Wigmore on Evidence,* section 1789 at page 235. "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted is original and material evidence, and not mere hearsay." *Nick Bombard, Inc. v. Proctor,* 47 A. (2) 405 (Mun. Ct. of Appeals, District of Columbia, 1946). Accordingly, the testimony in question was admissible to establish the prudence and reasonableness of appellee's conduct in satisfaction of its duty to mitigate damages.

Appellants cannot complain that the evidence was introduced generally, because they made no request to have its admission limited. The general admission of evidence which is admissible for a particular purpose is not reversible error in the absence of a request for an instruction limiting the effect of the evidence. *Tevis v. Ryan,* 233 U.S. 273, 34 S. Ct. 481; *Riley Investment Co. v. Sakow,* (C.C.A. 9) 110 F. (2) 345; *Peerless Petticoat Co. v. Colpak-Van Costume Co.,* 173 N.E. 429 (Mass. 1930); *Barsha v. Metro-Goldwyn Mayer,* 90 P. (2) 371 (Calif. 1939). Appellants' objections to the admission of the evidence as hearsay did not constitute a request that the evidence be admitted for a limited purpose. *Thompson v. City of Lamar,* 17 S.W. (2) 960, 975 (Mo. 1929); *Bartlett v. Vanover,* 86 S.W. (2) 1020 (Ky. 1935); *Ward v. Town of Waynesville,* 154 S.E. 322 (N. C. 1930).

Therefore, the trial court did not err in the admission of the testimony in question. The evidence was clearly admissible to show the reasonableness of the appellee's conduct, and the appellants made no request for an instruction limiting its effect.

2. The introduction of the testimony in question was not prejudicial to the appellants.

The appellants were not damaged by the admission of the testimony in question. The evidence constituted new matter for the purpose of showing the reasonableness of appellee's conduct, but the probative force of the matter asserted was merely cumulative. Other testimony

showed that appellee could not get its lumber loaded at Alaska (Tr. 281, 285) and that a company barge was not unloaded at Prince Rupert or Tacoma (Tr. 788, 436, 613-619). Appellants' representatives had repeatedly made the statement that company barges would not be unloaded below (Tr. 221, 299, 443, 444, 620). The information supplied by company agents added nothing more.

Even the erroneous admission of testimony is not prejudicial if the effect of such testimony is merely cumulative. *Sunny Point Packing Co. v. Faigh,* 63 F. (2) 921 (C.C.A. 9, 1933), reviewing a decision of the District Court for the Territory of Alaska, Division Number 1; *Twachtman v. Connelly,* 106 F. (2) 501 (C.C.A. 6, 1939); *Braswell v. Palmer,* 22 S.E. (2) 93 (Ga. 1942); *Brown v. Montgomery Ward and Co.,* 8 S.E. (2) 199 (N. C. 1940).

Therefore, the introduction of the testimony in question was not prejudicial to the appellants.

B. The Court Below Was Right in Its Rulings and Instructions on the "Contract Question."

There are two reasons why appellants' proposed instruction No. 11 (Br. 26) was rightfully refused, and why the court's rulings in excluding evidence of appellants' alleged "prior contract" with Juneau Lumber Mills, Inc., from whom appellee purchased its properties, were correct.

First, the existence of a labor contract relating to the assignment or performance of work has no relevancy under the statute upon which this action was founded. A contract between appellants and Juneau Lumber Mills, whether taken over by appellee or not, would not justify the conduct of appellants under the law, for Section 303(a)(4), does not excuse a strike or boycott or an inducement to strike or boycott over a work assignment because of a union contract. The only defense of a labor organization committing the acts here charged, which appellants have not denied, is that the employer's assignment they seek to change is contrary to a certification of the National Labor Relations Board which has determined the representation of the employees performing such work. The statute adds no exception concerning an assignment contrary to a labor agreement, obviously because an employer is answerable to the union so deprived of the work under the provisions of Section 301(a), allowing actions for breach of contract.

Second, even if appellants had correctly construed the statute in their proposed construction, the law is that where there is a bona fide transfer of the physical assets of an employer (assuming *arguendo* that Juneau Lumber Mills, Inc. was such to the I. L. W. U. members on the facts appellants adduced), as contrasted with the purchase of the corporate stock, the labor contracts then in effect do not bind the purchaser of those assets. *Essential Tool & Dye Corp.*, 13 L.R.R.M. 1698; *Carouso v. Empire Case Goods Co.*, 271 App. Div. 149, 63 N.Y.S. (2) 35. The rule of those cases is amply satisfied by the facts relating to the sale of the assets of its predecessor

to appellee. No issue was raised below, by argument or proof, that appellee's purchase was not *bona fide* and wholly unrelated to any evasion of the obligation of any labor contracts or Board order. Cf. *N. L. R. B. v. Hopwood Retinning Co.*, 98 F. (2) 97; *Bethlehem Steel Co. v. N. L. R. B.*, 120 F. (2) 641. Nor was there any common identity between the purchaser and seller such as was found in *N. L. R. B. v. Adel Clay Products Co.*, 134 F. (2) 342.

Appellants' citations (Br. 107) on the proposition that the matter was one for the jury, in addition to being irrelevant for the reason first above suggested, are also completely inapplicable to the proposition for which they are cited and in issue here. In the first case the question whether there was a meeting of the minds between the parties when the defendant offered to buy five cars of sugar and the plaintiff agreed to sell him three, the defendant accepting the first car shipped, was held for the jury. In the second, the decision of a Referee in Bankruptcy was under consideration, the Circuit Court of Appeals holding there was an implied contract as a matter of law when employees worked after the expiration of a union contract and while negotiations for a higher wage were being conducted. The court allowed a recovery on a *quantum meruit* basis.

The first case has no relevancy to any issue here. The second has no application to a change of employer, since neither was there present. Hence they do not disturb the rule of the cases cited above by appellee.

Thus the requested instruction was not only wrong because of the terms of the statute under which appellee sued, but even if the statute read as appellants contend it should, there was nothing in the evidence upon which the court could have instructed the jury under the doctrine of the above cases. Therefore the court was correct in refusing the instruction and in its rulings on the claimed contract issue.

CONCLUSION

A review of the record in this case reveals that the trial was conducted with the utmost fairness to appellants and that the verdict of the jury was founded upon clear, convincing and, for the most part, uncontradicted evidence establishing all of the elements of appellee's case. No errors affecting the rights of appellants were committed by the trial court. The judgment should therefore be affirmed.

Respectfully submitted,

HART, SPENCER, MCCULLOCH, ROCKWOOD & DAVIES,
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Attorneys for Appellee.

APPENDIX

IN THE DISTRICT COURT FOR THE
TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

C. J. BURRIS et al., Plaintiffs, vs. VETERANS ALASKA COOPERATIVE CO. etc., et al., Defendants.	)	No. 5986-A ORDER OVERRULING AND SUSTAINING DEMURRERS

After argument of counsel for the respective parties, and good cause appearing in the premises, it is—

ORDERED that all of defendants' demurrers be and hereby are overruled, except the demurrer of Veterans Alaska Cooperative Company, a partnership, which is hereby sustained.

Done at Juneau, Alaska, this 5th day of January, 1948.

(Signed) George W. Folta
JUDGE

Presented by
William L. Paul, Jr. (Sgd.)
of attorneys for Plaintiffs
OK as to form
(Sgd.) R. E. Robertson
of Attorneys for Defendants
Entered Court Journal
No. 19—Page 46

Filed in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, January 5, 1949, 3:47 p.m.
(Signed) J. W. Leivers, Clerk

IN THE DISTRICT COURT FOR THE
TERRITORY OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

C. J. BURRIS, HELEN G. BURRIS, BRUCE CRUIKSHANK and RAY A DILLON, Plaintiffs, vs VETERANS ALASKA COOPERATIVE CO., and STEVE LARSSON HOMER, CARL W. HEINMILLER, MARTIN A. CORDES, JAMES N. TRELFORD, TRESHAM D. GREGG, JR., as officers and directors of VETERANS ALASKA COOPERATIVE CO., and as a copartnership doing business under the firm name and style of VETERANS ALASKA COOPERATIVE CO., and CARL O. COMSTOCK, DIRECTOR OF VETERANS ALASKA COOPERATIVE CO., and EDWARD C. KOENIG, JR., as an officer and director of VETERANS ALASKA COOPERATIVE CO., Defendants.	No. 5986-A MEMORANDUM OPINION Filed Jan. 4, 1949.

DAVIS & RENFREW, of Anchorage, and WILLIAM L. PAUL, JR., of Juneau, for plaintiffs.

SIMON HELLENTHAL and R. E. ROBERTSON, both of Juneau, for defendants.

The complaint alleges a conspiracy on the part of the individual defendants as directors of Veterans Alaska Cooperative Co. to defraud the stockholders of that corporation and the Port Chilkoot Co. by various acts

of malfeasance on their part as directors, and officers, designed to enable them to obtain possession and ownership of stock and physical assets without consideration in disregard of their fiduciary obligations, in fraud of the rights of stockholders and in violation of the operating agreement between the two companies. The prayer is for an injunction, an accounting, the removal of defendants as directors and officers, and the appointment of a receiver.

The defendant Veterans Alaska Cooperative Co., separately as a corporation and as a partnership, and the individual defendants have demurred to the complaint on the ground that the Court has no jurisdiction of the person or of the subject of the action and that the complaint does not state facts sufficient to constitute a cause of action. In support of the ground that the complaint does not state a cause of action, each of the several overt acts set forth in the complaint is separately dealt with and shown to be quite innocuous standing alone. This of course will not do. When measured in connection with the conspiracy charge their significance and sufficiency become apparent. Thus, the attempt to obtain $25,000.00 in stock of the Port Chilkoot Co. to be exchanged for a part of the physical assets of Veterans Alaska Cooperative Co. of far greater value, which were in the possession of the former under the operating agreement described, would seem quite innocent, but when it is projected against the conspiracy charge the fact that the attempt failed is immaterial in the face of the allegation of a continuing conspiracy. The attempt was an overt act in furtherance of the conspiracy and

designed to effect the object thereof, for, manifestly, if Port Chilkoot Co. had been obliged to make the exchange, its earning potential and its ability to meet its obligations under the operating agreement would to that extent have been impaired and Veterans Alaska Cooperative Co. would have suffered correspondingly in revenue. Similarly, the argument that the defendant-directors and officers should be permitted to exercise their judgment as to the acts set forth in par. XIV ignores the character imparted to such acts by the conspiracy charge.

The point is also made that, since there is no allegation in the body of the complaint that Veterans Alaska Cooperative Co. is a partnership or that the individuals designated in the caption as members are members of Veterans Alaska Cooperative Co., there is no jurisdiction over that organization as a partnership. This objection is well taken, and the demurrer of the Veterans Alaska Cooperative Co. *as a partnership* must therefore be sustained. The other demurrers are overruled.

(Signed) George W. Folta
Judge

Filed in the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, January 4, 1949, 11:12 a.m.
(Signed) J. W. Leivers, Clerk

CERTIFIED COPY

United States of America,)
Territory of Alaska,) ss.
First Division.)

I, J. W. Leivers, Clerk of the District Court in and for the First Division, Territory of Alaska, do hereby certify that the hereto attached is a full, true and correct copy of the original MEMORANDUM OPINION AND ORDER OVERRULING AND SUSTAINING DEMURRERS IN CAUSE # 5986-A entitled C. J. BURRIS ET AL VS VETERANS ALASKA COOPERATIVE CO. ETC ET AL

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now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Juneau, Alaska this 9th day of October, A.D. 1950.

J. W. LEIVERS
Clerk.
By P. D. E. McIVER
Deputy Clerk.

No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,
Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

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PERNAU-WALSH PRINTING CO. SAN FRANCISCO

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No. 12,527

IN THE

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Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

I.

THE ISSUE OF WHO IS ENTITLED TO THE WORK MUST BE DECIDED BY THE BOARD BEFORE CONDUCT BECOMES ACTIONABLE UNDER SECTION 303(a)(4).

Before examining in detail the arguments advanced by appellee concerning the meaning of Section 303(a)(4) of the Act, it is our belief that it would be helpful to summarize briefly our position in that regard. Such a summary will help remove the confusion engendered by appellee's misconceptions of our arguments, and will make more evident the basic differences of the parties concerning the meaning of the law applicable to this case.

Appellants clearly demonstrated in their Opening Brief that a determination of the jurisdictional dispute (or an "arbitration" thereof, to use the language of appellee) by the Board under Section 10(k) was a condition precedent to an action for damages under Section 303(a)(4) of the Act. Such an arbitration by the Board, it was shown, is a jurisdictional prerequisite to an action under Section 303(a)(4) not because it would be "awkward" to have both the Board and a court hearing the facts concerning the same dispute at the same time, but because the acts proscribed by Section 303(a)(4) become illegal under that Section and hence actionable *only* when persisted in after an adverse Board determination under Section 10(k). Appellants proved that the defined primary concerted activities of labor organizations do not become unfair labor practices under Section 8(b)(4)(D) or illegal under Section 303(a)(4) until an adverse Board award of the disputed work is made.

This result followed from the differing Congressional treatment under the Act of jurisdictional disputes on the one hand, and secondary boycotts on the other. Congress determined to deal with the problem of secondary boycotts by making the ban on them complete, irrespective of the merits of the dispute giving rise to them.[1] Accordingly, no procedure was included in the Labor Relations Act under which the

[1]Thus, for example, the argument of Senator Murray that certain secondary boycotts were justifiable (Legislative History, p. 1455) was rejected in favor of the view of Senator Taft that all secondary boycotts were unjustified and should be prohibited. (Legislative History, p. 1106.)

Board was given authority to settle the dispute out of which a secondary boycott arose, and labor unions engaging in them were made subject unqualifiedly to unfair labor practice proceedings, and to actions for damages.

Congress reached a different result with respect to jurisdictional disputes. As was pointed out in our Opening Brief (pp. 43-47), the Senate view that the problem of obstructions to interstate commerce arising out of jurisdictional disputes could best be met by giving the Board authority to arbitrate such disputes on their merits, in order to finally settle them, prevailed over the sweeping position of the House that all activities of labor organizations arising out of jurisdictional disputes should be outlawed without regard to their equitable settlement. The Act as finally passed was thus tailored to meet the Senate's objectives. The parties to the dispute were given, in the first instance, authority to settle the dispute among themselves. Failing such a settlement, the Board was given authority to arbitrate the dispute, and to make an award determining which of the contending labor organizations was entitled to have the employees it represented perform the work in question.[2] This award of the Board was not made directly enforcible by petition to the Court of Appeals, as was the case with other orders of the Board. Instead, adherence to it was encouraged by providing certain

[2]Despite the implication to the contrary in the statement in Appellee's Brief, p. 14, that a labor union *may* submit to a hearing of the Board, the Board's hearing under Section 10(k) is mandatory, and proceeds without the necessity of obtaining the consent of the parties. *Moore Drydock Co.*, 81 NLRB 1108 (1949).

penalties or disabilities for non-compliance. Thus, if a contending labor organization against whom the Board's award had been adverse persisted in seeking the work by picketing the employer after the Board had ruled against it, it subjected itself to a cease and desist order under Section 8(b)(4)(D) and became liable under Section 303(a)(4) for any damages caused by picketing carried on after the award had been made. On the other hand, if the employer refused to abide by the Board's award, the union could seek to enforce it by primary economic action against him, secure from both a proceeding under Section 8(b)(4)(D) and an action for damages under Section 303(a)(4).

Our Opening Brief proved clearly that this view of the meaning of Sections 10(k), 8(b)(4)(D) and 303(a)(4) was the only one consistent with the congressional purpose with respect to jurisdictional disputes, as revealed by the legislative history. It indicated, in addition, that this view of the meaning and purpose of Section 10(k) had been accepted by the Board itself, in its decisions under the Labor Relations Act. (Opening Brief, pp. 37-43.) It was for these reasons that the judgment of the court below, based as it was on a disregard of the significance of the Board's authority under Section 10(k), was shown to be erroneous.

The appellee's attempt to answer these arguments, stripped to its essentials, relies on the proposition that appellants, as well as the Board itself, are misconstruing the provisions of Section 10(k) of the Act.

As will become evident, appellee's position must stand or fall on whether its view of the meaning of Section 10(k) is correct, for it advances no basic disagreement with, or attempted refutation of, the other propositions upon which appellants rely. Thus, while appellee states that whether or not conduct is an unfair labor practice under Section 8(b)(4)(D) of the Labor Relations Act is wholly immaterial to the consideration of whether such conduct is unlawful under Section 303(a)(4), and thus implies that the two sections are addressed to different conduct (Appellee's Brief, p. 18), it concedes that the damage action under Section 303(a)(4) lies for jurisdictional strikes "as defined in the Wagner Act" (Appellee's Brief, p. 12), i.e., in Section 8(b)(4)(D).[3] Nor does it answer the proof from the legislative history of the Act (Opening Brief, p. 37) that only conduct made unfair by Section 8(b)(4)(D) is actionable under Section 303(a)(4). Furthermore, appellee concedes that if the Board has authority under Section 10(k) to arbitrate a jurisdictional dispute, "there would have been not only logic, but necessity [for Congress to add] as a condi-

[3]This relationship between Title I and Title III of the Act, together with the "Declaration of Policy" which precedes and is applicable to all five titles of the Act, is the brief answer to appellee's implication that the various titles of the Act are not to be construed together. (Appellee's Brief, p. 11.) As we point out below, pp. 29-30, appellee itself rejects this obviously untenable position in its argument on the status of the trial court.

In that connection, it is beyond our comprehension how appellee can say in one breath that unions may be sued under Section 303 for engaging in jurisdictional strikes "as defined in the Wagner Act" [i.e., Title I of the Act], and then, at a later point in its brief, blandly declare that "* * * a suit for damages under Section 303 is not in any way affected or controlled by the substantive or procedural aspects of Title I of the Act". (Appellee's Brief, p. 93.)

tion precedent to Section 303(b) that the Board first arbitrate the issues." (Appellee's Brief, p. 22.)[4] Appellee thus recognizes that, granted the Board's authority to arbitrate, a violation of Section 303(a)(4) giving rise to damages will arise not simply by the commission of the acts enumerated, but by their commission *after* the Board's award has been made and in disregard of it.

We turn then to appellee's position concerning the meaning of Section 10(k) of the Labor Relations Act, and the Board's function thereunder. As far as can be determined from Appellee's Brief, it is as follows: The Board's duty under Section 10(k) "is not to *decide between union claims,* which may be on certification, interunion work-defining agreements, traditional jurisdiction, *et cetera,* for which a skilled arbitrator would be needed. Instead, the questions for decisions are simply (1) To whom had the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Section 9(c) of the National Labor Relations Act?" (Appellee's Brief, p. 21.) If the Board's answer to the second question is in the negative, according to appellee, the Board *must* find that the organization to whom the employer has assigned the work is entitled to it. The Board, says appellee, has no discretionary authority whatsoever under Section 10(k), and the inquiry it makes under the section is a mere formality.

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[4]That Congress did so, although in poorly drawn language, is shown in our discussion below, p. 15.

In fact, it is contended, the inquiry which it can make under Section 10(k) is limited to and identical with that which it must make in determining whether Section 8(b)(4)(D) has been violated. Hence, Section 10(k) not only fails to give the Board authority to arbitrate a jurisdictional dispute on the merits, but is in effect superfluous, since it adds no authority to that given the Board under Section 8(b)(4)(D). Under this view of Section 10(k), appellee argues that, absent a pre-existing certification of the Board under Section 9(c), the issue of who is entitled to the work never arises in a hearing under Section 10(k), in an unfair labor practice proceeding under Section 8(b)(4)(D), and in an action for damages under Section 303(a)(4).

To support this view of the meaning of Section 10(k), appellee relies on the process of amendment to which Section 8(b)(4)(D) was subjected before it emerged in final form. According to appellee, these amendments somehow changed the intention of Congress that jurisdictional disputes should be arbitrated on their merits, and substituted for such intention the view that once an employer had assigned work to employees represented by a particular labor organization, that assignment was just and proper. Appellee thus argues, in effect, that even though the language of Section 10(k) as passed clearly supports the authority of the Board to arbitrate a jurisdictional dispute, its language must be ignored because of the amendments made to Section 8(b)(4)(D) during its progress through Congress.

The argument of appellee cannot be accepted for many reasons. In the first place, it asks this Court to ignore the plain language of Section 10(k), in violation of the elementary rule that a statute should be construed so that effect is given to all its provisions.[5] In this case, the interpretation sought by appellee is so strained as to require that the provisions of Section 10(k) be ignored entirely! Secondly, appellee's position concerning Section 10(k), and the Congressional intent regarding jurisdictional disputes, is untenable in the light of portions of the legislative history not referred to in its brief. Thus, the authoritative explanation of the meaning of Section 10(k) in the bill as passed given by the managers of the conference on the part of the House[6] clearly demonstrates the intention of Congress to give the Board authority under Section 10(k) to arbitrate jurisdictional disputes, and to determine which labor organization has jurisdiction of the disputed work. In addition, the remarks of Senator Morse, made during the Senate debate on the Conference Bill in the form in which it finally became law, make it clear that Section 10(k) as finally passed was intended by Congress to give the Board full discretionary authority to arbitrate juris-

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[5]*Sutherland, Statutory Construction,* 3rd Ed. (Horack), Vol. 2, Section 4705.

[6]House Conference Report No. 510 on H. R. 3020, page 57, remarks printed in full in Opening Brief, pp. 46-47.

dictional disputes.[7] The fact that the Senator, whose own bill S. 858 was the genesis of Sections 8(b)(4)(D) and 10(k), recognized that the bill as passed gave the Board the same authority to settle jurisdictional disputes as would have been exercised by an arbitrator under his bill, and that his views were not disputed by any other senator, again refutes the appellee's contention. These two excerpts from the legislative history demonstrate that after Section 8(b)(4)(D) had been amended *into its final form,* both

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[7]Senator Morse stated:

"In this connection we must examine, too, the provisions of the bill requiring the Board to determine:

* * * * * * *

"Second. What are proper work-task allocations as between unions involved in jurisdictional strikes.

"The Board must perform both of these tasks without the assistance of economic analysts, for under section 4 (a) of the bill it is forbidden to hire such employees. This is much like requiring the Veterans' Administration to provide hospital and medical care for veterans but forbidding them to employ doctors and nurses.

"I am especially disturbed about the amendment made in conference which requires the Board itself, rather than an arbitrator, to decide these jurisdictional disputes. I think the provision is completely unworkable. Under this provision the Board will have to hear and decide the merits of the disputes in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.

"The provision in the Senate bill authorizing the Board to appoint an arbitrator to settle jurisdictional disputes over work assignments was taken from the bill I introduced, S. 858.

"One of the major reasons for suggesting that an arbitrator, rather than the Board itself, handle these problems was that time is of the essence and the regular procedure of the Board is not an effective remedy for these cases. I certainly agree that jurisdictional disputes must be settled, but I am satisfied that the procedure now set up in the bill is not an effective solution." (Legislative History, p. 1554.)

houses of Congress fully intended to give the Board authority to arbitrate under Section 10(k).

In the third place, appellee cannot deny that the Board itself, whose interpretation of the Act is entitled to great respect (see note 14, Opening Brief, p. 43), has rejected its position concerning the meaning of Section 10(k). It did so not only by its direct ruling in the case of *Juneau Spruce Corporation,* 82 NLRB 650 (1949),[8] but by its decisions in all subsequent cases. Thus, despite appellee's assertion to the contrary, the Board *did* make a determination in the case of *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (1950) of the labor organization which was entitled to the work in question. There, the disputed work had already been assigned by the employer to an employee represented by the Teamsters Union. Despite this fact, and the absence of a pre-existing 9(c) certification on behalf of either the Teamsters or the Fur and Leather Workers Union, the Board held that the work should be re-assigned to an employee represented by the Fur and Leather Workers Union. The case offers an excellent illustration of the frustration of Congressional purpose which would result if appellee's views concerning the meaning of Section 10(k) were adopted. For, under appellee's reasoning, the mere fact that the work had been already assigned by the employer in that case would constitute a determination of who was properly entitled to the work. If the Board had conceived its

[8]See Opening Brief, pp. 39-42.

inquiry under Section 10(k) to be that claimed by appellee, it would have been compelled to find that the employees represented by the Teamsters were entitled to perform the disputed work task, irrespective of whether such a result would have encouraged harmonious labor-management relations. By its decision, the Board recognized the Congressional intention that the power of employers to assign work to whomever they pleased should yield to the judgment of the Board, based as it was on the interests of all the parties and the public, and not merely on that of the employer.

The appellee fails to see that by its treatment of jurisdictional disputes, Congress intended to limit what appellee still insists is the employer's plenary right to assign work. Such a restriction of employer authority undoubtedly is unpalatable to some employers. It may be said that such a restriction is no more palatable to some employers than was the restriction contained in the original Section 7 of the Wagner Act on the employers' therefore unlimited power to hire and fire. In each instance, however, Congress has exercised its judgment that the restriction of employer power in question is justified by the power of Congress to regulate labor-management relations in the public interest.[9]

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[9]Appellee's misconception of Section 10(k) also leads it to make completely unjustified assertions in the portions of its brief dealing with the trial court's refusal to instruct the jury concerning the policies of the Act. (Appellee's Brief, pp. 86-90.)

Appellee claims that had it acceded to the request of Local M-271, I.W.A., to assign the barge-loading work to longshoremen represented by Local 16, it would not only have been violating its agree-

All of the foregoing effectively refutes appellee's views with respect to Section 10(k). More than that, it demonstrates the error in appellee's position that the question of who is entitled to the work is never an issue in an action under Section 303(a)(4). For, as we pointed out in our opening brief, and as appellee has in effect conceded, if that question is one that must be decided by the Board before proceedings under Section 8(b)(4)(D) can be instituted, it is equally necessary that it be determined before conduct can become actionable under Section 303(a)(4).

This analysis of the appellee's position makes unnecessary any extended consideration of the discussion in its brief of the doctrine of primary jurisdiction. That doctrine, as a reading of our Opening Brief will demonstrate (pp. 52-53), was not relied on to

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ment with Local M-271, but would have been violating the law as well. Appellee thus makes the startling assertion that it would have been violating the Act had it settled the entire dispute here in a manner specifically provided for in the Act. The very terms of Section 10(k) contemplate the voluntary adjustment of jurisdictional disputes by the parties themselves.

Furthermore, appellee admitted that when Local M-271 asked it to assign the work to the longshoremen, in accordance with the agreement between the two Locals, Local M-271 was asking that its agreement with appellee be modified to that extent. (T. R. 309.) We know of no principle of contract law, nor does appellee point one out, which would subject one contracting party to an action for breach of contract for assenting to the modification of a contract at the request of the other party.

Finally, by assigning the barge-loading work to the longshoremen at the request of Local M-271, the appellee would no more have violated Section 8(a)(3) of the Labor Relations Act than it did when it deprived the longshoremen in October, 1947, of work they had been doing for appellee to that time. (T.R. 216-218, 232.) In neither instance could it be demonstrated that the assignment was motivated by the union affiliation or lack of affiliation of the workers involved, which is essential to a violation of Section 8(a)(3).

prove that a determination of who is entitled to the work in question was an issue in an action under Section 303(a)(4). On the assumption that appellee might agree that it was an issue in such an action, the doctrine was discussed to prove that only the Board, and not the court or jury, was entitled to make such a determination. In short, the doctrine was discussed to refute an anticipated argument that appellee might make: namely, that granted a determination of the dispute on its merits was proper, the jury in the trial below had made such a determination. As is now evident, appellee has advanced no such argument. It has admitted that the issue of who was entitled to the work in question here was *never* submitted to the jury. (Appellee's Brief, p. 23.) It has thus made the application of the doctrine of primary jurisdiction unnecessary to appellants' argument that the judgment of the trial court was erroneous.

For the benefit of this Court, however, it might be well to state that appellants never asserted that the doctrine of primary jurisdiction has universal application in cases of concurrent administrative and judicial jurisdiction. As a matter of fact, other sections of the Act involved in this case provide an example, in addition to those cited in Appellee's Brief, of statutory provisions which permit a private party to sue for damages without waiting for action by the public agency charged with administering the basic statute. Section 8(b)(4)(A) of the Labor Relations Act defines the unfair labor practice of what is commonly known as the secondary boycott. Section 303(a)(1) of

the Act, taken together with Section 303(b), provides private parties with the remedy of a damage action for injuries suffered by the conduct defined in Section 8(b)(4)(A). There is no doubt in our minds that a private party could sue under Section 303(a)(1) at the same time that the Board was proceeding with unfair labor practice charges under Section 8(b)(4)(A), or even before the Board instituted proceedings under the latter section. The distinction between such a situation and the one which exists with respect to jurisdictional disputes is that nowhere in the Labor Relations Act is there a section, corresponding with Section 10(k), which is to be administered together with Sections 8(b)(4)(A) and 303(a)(1). Stated in another way, the Board has no authority whatsoever under the Labor Relations Act to find that a labor organization is entitled to carry on a secondary boycott. Under Section 10(k) of the Act, however, the Board has authority to find that a labor organization is entitled to particular work tasks. Thus, under Section 10(k), the Board is exercising a function similar to that exercised by the Interstate Commerce Commission under that body's rate-making powers. It is making a judgment requiring the specialized knowledge inherent in the administrative process. In deciding the question of who is entitled to the work, the Board is making another determination of the type referred to by this Court in *Calif. Ass'n. v. Building and Constr. Tr. Council,* 178 F. (2d) 175 (9 Cir. 1949) as one over which the Board has exclusive primary jurisdiction, subject to judicial review. (178

F. (2d) 175, 177, n. 3.) When it proceeds under Section 8(b)(4)(A), however, it is merely determining whether certain activities for proscribed objects have taken place, a determination which may be made with equal facility by courts, without violating the doctrine of primary jurisdiction.

To summarize, if appellee were arguing that the jury in the trial below had the same authority to arbitrate the question of who was entitled to the work as the Board did under Section 10(k), then the application of the doctrine of primary jurisdiction to this case would be of real moment. Since appellee agrees with us, but for different reasons, that the jury had no such authority, a detailed further consideration of the doctrine would serve no useful purpose.

We turn now to a consideration of the argument that if Congress had intended a determination of the dispute by the Board under Section 10(k) to be a condition precedent to an action for damages under Section 303(a)(4), it would have said so. It might be said, first of all, that such an argument hardly is available to appellee, who is faced with the question of why, if Congress intended Section 10(k) to be meaningless, or to mean the opposite of what it says, it passed the section with the language which it contains. The answer to the question itself, however, is that Congress did say so, albeit in a much less clear fashion than possible. Before showing this, it should be pointed out that if the language of Section 303(a)(4) were clear and unambiguous, there would be no

room for its construction, and no occasion for the references to the Congressional history which both parties on this appeal have made in their briefs.[10] Appellee has already mentioned *Printing Specialties, etc. Union v. LeBaron,* 171 F. (2d) 331 (9 Cir. 1948), the case decided by this Court which recognizes the lack of clarity in the Act's language. The point is that the language of the statute is sufficiently lacking in clarity to require construction.

The answer, then, to this argument of appellee is that the language of Section 303(a)(4) does lend support to appellants' construction. The section provides that the activities enumerated in it are not unlawful, if the "employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work". It is to be noted at once that, unlike Sections 303(a)(2) and 303(a)(3), which refer specifically to certifications of the Board under the provisions of Section 9 of the Labor Relations Act, the "order or certification" of the Board referred to in Section 303(a)(4) is not made referable to a particular provision of the Labor Relations Act. Hence, it is not unreasonable to assume that the order or certification referred to in Section 303(a)(4) includes an order or certification made by the Board under Section 10(k) of the Labor Relations Act. It should be recalled, in that connection, that the Rules and Regulations and Statements of Procedure issued

[10] *Sutherland, Statutory Construction,* 3rd Ed. (Horack), Vol. 2, Section 4702.

by the Board under Section 10(k) (see Opening Brief, pp. 38-39) refer to an issuance of "certification" by the Board after hearing under that section.[11] A certification of the labor organization which shall perform the particular work tasks in issue is the equivalent of a certification that the employees whom that organization represents are entitled to perform particular work tasks, and, in effect, a determination "of the bargaining representative for employees performing such work."

That the quoted language from Section 303(a)(4) must include an order or certification of the Board under Section 10(k) is demonstrated by the absurd results which would otherwise follow. A case we have already referred to which the Board has decided under Section 10(k) provides an excellent example. In *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (195), the Board's determination required the employer to re-assign particular work being performed by employees represented by the Teamsters Union to employees represented by the Fur and Leather Workers Union. Let us assume the employer had refused to reassign the work and thus refused to comply with the Board's determination. Let us further assume that the employees represented by the Fur and Leather

[11]Section 203.76 of the Board's Rules and Regulations applicable to Section 10(k) provides, in part:

"Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, *to certify the labor organization* or the particular trade, craft or class of employees, as the case may be, *which shall perform the particular work tasks in issue*, or to make other disposition of the matter. * * *" (Emphasis supplied.)

Workers Union had refused to work until the employer made the reassignment. Unless the order or certification referred to in Section 303(a)(4) were construed to include one issued by the Board under Section 10(k), the employer in an action under Section 303(a)(4) could collect damages from the Fur and Leather Workers Union for a strike caused by *his* failure to comply with the Board's determination of the dispute! A construction which included a Board order under Section 10(k) within the meaning of Section 303(a)(4) would properly exempt such conduct by the Fur and Leather Workers Union from damages, since the necessary condition that the employer was not conforming would be met. In view of these considerations, it can be stated that the language of Section 303(a)(4), although ambiguous, when properly construed entirely supports the position advanced by appellants.

Only two additional misconceptions of appellee remain for reply. Appellee relies on a statement made by Senator Morse during Congressional debate in its attempted refutation of our position. (Appellee's Brief, p. 17.) It should be explained first that the remarks of Senator Morse thus quoted by appellee referred specifically to Sections 303(a)(1), (2) and (3), and not to Section 303(a)(4).[12] In any event,

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[12]This is demonstrated by the fact that Senator Morse talks about the Board being *required* to seek injunctive relief. The Board *must* seek injunctive relief only when charges under Sections 8(b)(4)(A), (B) and (C) are involved, and *may exercise its discretion* concerning whether to seek injunctive relief in instances of charges under Section 8(b)(4)(D). See Section 10(1).

they are not inconsistent with anything said by appellants. As we have already stated, nothing in the Act requires actions for damages under Sections 303 (a)(1), (2) and (3), to await Board orders under Sections 8(b)(4)(A), (B) and (C). As a matter of fact, this is equally true with respect to actions under Section 303(a)(4). Such actions can undoubtedly be brought before the Board has issued any order *under Section 8(b)(4)(D)*. And we have never made assertions to the contrary. What we have said is that neither a Board proceeding under Section 8(b)(4)(D) nor an action for damages under Section 303(a)(4) can take place *until the Board has made a determination under Section 10(k)*. Once such a determination is made, it is entirely possible for both court and Board action under the two related sections to proceed simultaneously.

This misconception of appellants' position by appellee has led to an additional one, namely, that it is our contention that the order of the Board under Section 10(k) is final. (Appellee's Brief, p. 16.) No such position was taken by appellants in their Opening Brief. Actually, under appellants' view of the statute, the Section 10(k) order of the Board, which must precede court action, would be properly reviewable by the court in an action under Section 303(a)(4). In such a review the court would be guided by the same standards that guide the courts in their review of other Board orders. These standards are given in Section 10(e) of the Labor Relations

Act, and the numerous decisions construing that section.[13]

The foregoing discussion may now be briefly summarized. It is evident that the conflict between appellants' position and that of appellee is basically whether or not the issue of which employees are entitled to particular work tasks can be decided except by the employer.[14] Appellee contends that once an employer has made an assignment of particular work, or re-assigned particular work from one group of employees to another, his decision must be accepted by all of his employees, and the labor organizations which represent them, irrespective of any consideration whatsoever other than a pre-existing certification by the Board under Section 9 of the Labor Relations Act. Once the employer has acted, says appellee, any primary concerted activities by labor organizations representing his employees in opposition to such assignment makes them answerable in damages under Section 303(a)(4). We think we have conclusively demonstrated that Congress rejected such a view in the legislation under discussion. Congress, in its desire to solve the problem of jurisdictional disputes, substituted the *resolution* of such disputes by an impartial, specially skilled agency such as the Board for

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[13]See Davis, *Scope of Review of Fed. Admin. Action*, 50 Columbia L. Rev. 559, cases collected in note 24, at 562.

[14]It has been shown that appellee virtually concedes that if the Board has authority to make such a decision, an action under Section 303(a)(4) will not lie until such decision has been made by the Board. (See supra, pp. 5-6.)

the impasse and consequent obstructions to interstate commerce created by unlimited employer power in this field. An action under Section 303(a)(4) was thus made available not for union opposition to an *employer* determination, but for such opposition to one made by the *Board*. The failure of the trial court to so construe the statute made its judgment fatally erroneous.

II.

THE COURT BELOW IS NOT A DISTRICT COURT OF THE UNITED STATES.

A. Appellee's argument does not demonstrate to the contrary.

The narrow question here presented to this Court is whether the District Court for the Territory of Alaska is a "district court of the United States" within the meaning of Section 303(b) of the Labor-Management Relations Act of 1947. It was to that narrow question that we directed attention in our Opening Brief.

Appellee confuses the issue by a generalized discussion of the differences between an "Article III" and an "Article IV" court. This leads appellee to make the assertion that a case which considered the status of the *Court of Appeals* for the *District of Columbia* for the purposes of the *Trade Commission Act*[15] is "decisive" here,[16] and permits appellee to ig-

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[15] *Federal Trade Commission v. Klesner*, 274 U.S. 145.

[16] Appellee's Brief, p. 45.

nore such cases as *In re Cooper,* 143 U.S. 742, and *Carscadden v. Territory of Alaska,* 105 F.2d 377. In both these cases the court had before it the precise question now presented—i.e., the status of the District Court in the Territory of Alaska.

To generalize the discussion the way appellee does and to avoid consideration of the cases which discuss the court in Alaska is to do a "disservice to . . . clear analysis."[17] The argument made by appellee and the cases cited by it do not bear directly upon the status of the court in Alaska. As a matter of fact, most of the cases deal with the status of the District Court for the District of Columbia.[18]

B. The cases dealing with the District Court for the District of Columbia are not "decisive" of the issue here.

The complete answer to appellee's argument, and particularly to that portion of it which is based upon *Federal Trade Commission v. Klesner, supra,* is that there is and always has been a vast difference be-

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[17]Appellee's Brief, p. 31. Incidentally, our capitalization was for emphasis only. We were and are satisfied that the decision of this Court will turn on the merits of our position and not on typographical forms employed in our brief.

[18]e.g., *O'Donoghue v. United States,* 289 U.S. 516 (Appellee's Brief, pp. 33, 35); *Federal Trade Commission v. Klesner, supra* (Appellee's Brief, pp. 45-48); *Page v. Burnstine,* 102 U.S. 664 (Appellee's Brief, pp. 38, 43, 45); see also the reliance placed by appellee for the same purpose upon other cases dealing with the District of Columbia: *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427 (Appellee's Brief, p. 32); *National Mutual Insurance Co. v. Tidewater Transfer Co.,* 337 U.S. 582 (Appellee's Brief, p. 33); *United States v. United Mine Workers,* 77 F. Supp. 563, etc. (Appellee's Brief, p. 36); and *United States v. Brotherhood of Locomotive Engineers,* 79 F. Supp. 485, etc. (Appellee's Brief, p. 36.)

tween the status of courts in the District of Columbia and those in the territories. This is made clear in *O'Donoghue v. United States, supra,* which is cited no less than five times in Appellee's Brief.[19]

In the *O'Donoghue* case the Supreme Court held that Article I, Section 3, of the Federal Constitution applied to the Supreme Court and the Courts of Appeal for the District of Columbia, and that the compensation of the judges of those courts could not lawfully be diminished during their terms of office.

The court in reaching this conclusion reviewed the early legislation and decisions dealing with the status of territorial courts commencing with *American Insurance Co. v. Canter,* 1 Pet. 511, including specifically *McAllister v. United States,* 141 U.S. 174, which, as we pointed out in our Opening Brief, dealt directly with the status of the District Court for the Territory of Alaska. After this review the court concluded that territorial courts (as distinguished from the courts in the District of Columbia) were not embraced within the purview of Article I, Section 3, of the Constitution. This was so because:

> "Since the Constitution provides for the admission by Congress of new states (Art. 4, § 3, Cl. 1), it properly may be said that the outlying continental public domain, of which the United States was the proprietor, was, from the beginning, destined for admission as a state or states into the Union; and that as a preliminary step to that foreordained end—to tide over the period of

[19]pp. 33, 35, 38, 41, 45.

> ineligibility—Congress, from time to time created territorial governments, the existence of which was necessarily limited to the period of the pupilage . . .
>
> "The impermanent character of these governments has often been noted. Thus, it has been said, 'The territorial state is one of pupilage at best,' Nelson v. United States, (C.C.) 30 F. 112, 115; 'A territory, under the constitution and laws of the United States, is an inchoate state,' Ex parte Morgan (D.C.) 20 F. 298, 305. 'During the term of their pupilage as Territories they are mere dependencies of the United States.' Snow v. United States, 18 Wall. 317, 320, 21 L.ed. 784. And in Pollard v. Hagan, 3 How. 212, 224, 11 L. ed., 565, the court characterizes them as 'the temporary territorial governments.'" 289 U.S. at 537-8.

This reasoning is clearly applicable to the Territory of Alaska, and, as indicated, among the authorities considered in connection with it was at least one[20] which directly and specifically dealt with the Territory of Alaska.

Having discussed at some length the nature of territorial government, the court in the *O'Donoghue* case turned to a consideration of the status of government in the District of Columbia and commenced its discussion with the following significant sentence:

> "How different are the status and characteristics of the District of Columbia!" (*id.* at 538.)

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[20] *McAllister v. United States, supra.*

The language of Article I, Section 8, Clause 17, of the Constitution, dealing with the District of Columbia, is referred to as "words of permanent governmental power," and it is pointed out that the District of Columbia as the seat of the Government was intended to have a permanent and fixed status different from that which attached to the territories. The opinion points to considerations of a constitutional, legislative and judicial character which make it clear that there is a basic juridical difference between the status of government in the territories and that in the District of Columbia.

This distinction between the District of Columbia and the outlying territories of the United States, solidly grounded as it is in logic and history, was the basis for the decision in the *O'Donoghue* case, and it inevitably follows that nothing the Supreme Court has ever said about the status of the courts in the District of Columbia can be "decisive," or for that matter even persuasive, upon the question of the status of a territorial court.

What has been said above explains the court's decision in *Page v. Burnstine,* 102 U.S. 664, referred to by appellee at pp. 38, 43 and 45 of its brief. Even further, in that case the statute which the court was construing was one which related to the competency of witnesses in "the courts of the United States." Clearly the district court for the District of Columbia was a "court of the United States," and the narrow question here presented was not before the Supreme Court.

The only case cited by appellee in which a territorial court was held to be covered by a statute where the phrase in question was "United States District Court" is *"The Maret,"* 141 F.2d 431. In that case, however, as the footnote upon which appellee relies indicates, there was no issue raised concerning the question, and the court considered the matter of such little significance, in view of that fact, that there was no discussion of the question in its opinion, but only a passing reference to it in a footnote.

The reasoning of *"The Maret,"* as well as of the other cases cited by appellee, including *Federal Trade Commission v. Klesner,* (assuming that those cases are applicable here and ignoring their special status as cases involving courts in the District of Columbia) is substantially that the statute had to be interpreted to make the court in question a "district court of the United States," because otherwise an objective of the statute would be defeated. It is similarly argued by appellee in the case at bar that unless the court in Alaska is held to be a district court of the United States there would be no form within which a Section 303 action could be maintained in Alaska. While this argument may have had some validity in *"The Maret"* and in *Federal Trade Commission v. Klesner,* it is not meritorious here, since Section 303 specifically confers jurisdiction not only on district courts of the United States but upon "any other court" having jurisdiction of the parties, as we pointed out in our Opening Brief, p. 71.

C. A general statute vesting a territorial court with the jurisdiction of a district court of the United States does not make that court a district court.

The next major error into which appellee falls is its conception that because the law which created the Alaska court vested it "with the jurisdiction of district courts of the United States," 48 USCA 101, it therefore follows that the Alaska court is a district court of the United States. This error, first enunciated at p. 33 of Appellee's Brief, pervades its entire argument. The defect with this position is that it has repeatedly been held that the mere grant of a district court's jurisdiction to a territorial court does not make the latter a "district court of the United States."

In *United States v. Burroughs,* 289 U.S. 159, which as its citation indicates is reported in the same volume as the *O'Donoghue* case, *supra,* the Supreme Court had occasion to consider the appellate jurisdiction of the Court of Appeals of the District of Columbia. The question before it was whether the Criminal Appeals Act of 1907 which used the phrase "district courts" was applicable to the Supreme Court of the District of Columbia. It was argued, as it is here by appellee, that the District of Columbia court was such a court because by statute it was vested with the same jurisdiction as district courts of the United States. The court rejected this argument and said:

> "But vesting a court with 'the same jurisdiction as is vested in district courts' does not make it a district court of the United States. This has been repeatedly said with reference to territorial

courts. Reynolds v. United States, 98 U.S. 145; Stephens v. Cherokee Nation, 174 U.S. 476; Summers v. United States, 231 U.S. 92." 289 U.S. at 163.[21]

The court further pointed out very clearly that the Criminal Appeals Act "employs the phrase 'district courts,' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' "

So here, Section 303 employs the phrase "district courts of the United States," not "courts of the United States" or "courts exercising the same jurisdiction as district courts" or any other such phrases.

Clearly, therefore, the mere fact that a territorial court is vested with the jurisdiction of a district court of the United States does not make it such a court.

D. The argument of appellee should be addressed not to this Court, but to the Congress, since this Court is not empowered to add to the statute matters which the Congress has not included therein.

Appellee relies upon the fact that Congress used five separate designations of courts throughout the different sections of the Act. From this it argues that the correct application of the definition of the phrase "district court of the United States" in Section 303(b) would result in a series of absurd and untenable situations.

In the first place, appellee is raising a false issue. This Court is not presently called upon to pass upon

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[21]See, also, the almost identical language from *Mookini v. United States*, 303 U.S. 201, 205, quoted in Opening Brief, p. 60.

any of the hypothetical situations conjured up by appellee. It is called upon only to determine whether the Alaska court is a district court of the United States within the meaning of Section 303(b). It will be time enough for this Court to consider the other problems raised by the appellee if and when litigation presenting those problems is before it.

In the second place, arguments of this character have been almost universally rejected by the courts. The argument in effect asks this Court to rewrite the statute in a manner which appellee believes would be more orderly and logical. However, it has long been settled that courts have no authority to do what Congress might have done but did not do. In our Opening Brief we noted the likelihood that this argument would be made, and we cited the cases[22] in which such contentions were rejected and in which courts held that it was not their function to engraft upon a statute additions or modifications which they thought the legislature might or should have made.

Appellee's complaint on this score (or rather the complaint of other litigants who might be damaged by virtue of any of the hypothetical situations envisaged by appellee) must be directed to the legislature, not to the courts.

Finally, appellee here is guilty of a real inconsistency. In its discussion of Point I of our Opening

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[22]*Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1;
Commissioner v. Gottlieb, 265 U.S. 310;
Kalb v. Feuerstein, 308 U.S. 433;
United States v. Cooper Corp., 312 U.S. 600.

Brief, to-wit, that a Section 10(k) determination is a jurisdictional prerequisite to a Section 303(a)(4) suit, appellee makes the point that Section 10(k) and Section 303(a)(4) are found in separate titles of the Act and deal with separate and distinct kinds of rights, and therefore the court should proceed in a Section 303(a)(4) suit as though Section 10(k) were not in the Act. At this point, however, appellee is quite content to go back to Title I and to other titles of the Act for the purpose of attempting to demonstrate that the words used in Section 303(b) do not mean what they say and what they have been for many years judicially declared to mean, but that they mean something quite different.

In concluding this phase of the discussion it must be observed that appellee has not cited a single case which holds that the District Court for the Territory of Alaska is a district court of the United States under any statute or for any purpose. On the contrary, all of the authority to which the Court's attention has been directed indicates that it is not such a court. Secondly, save for *"The Maret,"* appellee has not cited a single case in which any territorial court has been held to be a district court of the United States, and in *"The Maret"* the point was not raised and the legislation was such that unless the court so interpreted the statute there would have been no relief available; neither of these factors is present here. Thirdly, appellee's reliance upon cases dealing with the courts in the District of Columbia is rendered nugatory by the opinion in the *O'Donoghue*

case, which points out the sharp differences between the government of that District and the government of outlying territories of the United States. In substance, appellee's arguments do not meet the contention advanced by us in our Opening Brief, amply supported by authority, to the effect that the trial court was not and is not a district court of the United States.

III.

AS A RESULT OF MISCONCEIVING ITS STATUS, THE TRIAL COURT DID COMMIT SERIOUS ERROR TO THE PREJUDICE OF APPELLANTS WITH RESPECT TO ITS JURISDICTION OVER THEM AND ITS ACCEPTANCE OF FAULTY SERVICE OVER APPELLANT INTERNATIONAL.

A. As to jurisdiction.

Appellee does not state the problem correctly when it says that the question is whether or not the Alaska court would have the right to hear and decide a case in which an unincorporated association was a party.[23] The question is whether absent the provisions of Section 301 of the Act, which authorize suits against labor organizations as entities and give jurisdiction to United States district courts in the district where such organizations have their principal office or duly authorized agents engaged in representing employee members, the Alaska court had jurisdiction over the International.

Since the Alaska court was not a district court of the United States, its jurisdiction cannot be based

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[23]Appellee's Brief, p. 52.

upon the provisions of Section 301 and must be found either in the common law or in the special statutory law of Alaska. As we pointed out in our Opening Brief, it is found in neither, and the appellee does not indicate any Alaska code upon which the jurisdiction of the court could be based.

Addressing ourselves first to the narrow question of whether or not a labor organization can be sued as an entity in the Alaska court, we point out first that at common law there was no jurisdiction in any court to entertain such a suit. This is demonstrated not only by the decision in *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, but by every collection of authorities on the subject, one of the more recent of which is referred to by appellee itself—i.e., 149 A.L.R. at 510, where it is said:

> "It is a well established rule that at common law, in the absence of an enabling or permissive statute, an unincorporated voluntary association is not capable of being sued in its common or association name, for the reason that such an association, in the absence of statutes recognizing it, has no legal entity different from that of its members."

There follows a long list of authorities from at least thirteen different jurisdictions to support this view. Whatever may be the rule in United States district courts as enunciated in the *Coronado Coal* case, *supra,* we have been cited no authority by appellee which indicates that this is the rule in the territorial court of Alaska, sitting as it does in this case as a court of general jurisdiction in the Territory of Alaska.

But irrespective of the question of whether the Alaska court has jurisdiction over any unincorporated labor organization as an entity, the question here is whether it has jurisdiction over such a labor organization *which is a non-resident of the Territory of Alaska and maintains no principal place of business there.*

At page 76 of our Opening Brief we made the categorical statement that "A thorough perusal of the three volumes of the Alaska Compiled Laws, Annotated (1948), reveals no statute of the Territory which authorizes service upon a non-resident association." That statement has not been challenged by the appellee, and this Court may take it, therefore, that there is no such statute.

In the absence of such a statute there is no basis in the Alaska law for the assumption of jurisdiction over the International, which as to Alaska was a non-resident unincorporated association. The doctrine of *Flexner v. Farson,* 248 U.S. 289, and *Doherty & Co. v. Goodman,* 294 U.S. 623, referred to at pages 74-75 of our Opening Brief, impels the conclusion that in the absence of such a statute no foreign association could be subjected to the jurisdiction of courts of the Territory of Alaska simply by service upon an agent doing business in the state. It is undoubtedly because appellee recognizes that the Alaska court did not obtain jurisdiction over the International under the common law or the Alaska statutory law, that it is compelled to argue that the trial court was a district court of the United States. If true, this

would permit the application of the provisions of Section 301 to the cause, and the assertion of jurisdiction over the International; since the trial court was not a district court of the United States, it could not properly do this, and consequently its jurisdiction must fall.

B. As to service.

The service upon Albright was not adequate to give service upon the International, and appellee's reliance upon *Sperry Products, Inc., v. Association of American Railroads,* 132 F. 2d 408, cert. den. 319 U.S. 744, is misplaced. In that case there was no question of the *jurisdiction* of the federal court, since the action was one for *patent infringement.* The only problem was one of *venue,* and the court held that the association in question was present wherever any substantial part of its activities was being carried on, and for that reason it was present in the Southern District of New York, although its headquarters were in Washington, D. C. In the case at bar it is not suggested that the International is engaged in any activities in Alaska. On the contrary, the entire controversy out of which this lawsuit arose was between appellee and Local 16. The International was in the picture only in the most peripheral manner and ultimately only because, as Albright's affidavit (T.R. 8-14) shows, the International was employing him to assist its locals. The connection of the International with Albright is certainly different from the operation of the association in the *Sperry* case.

The court in *Thermoid Co. v. United Rubber Workers of America,* 70 F. Supp. 228, 233,[24] says of the *Sperry* case.

> "Since this was a suit under the patent laws, *venue* was broader than exists in the instant case under Section 51 of the Judicial Code. For venue in patent actions must be laid 'in the district of which the defendant is an inhabitant' or 'in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." 48 Judicial Code, 28 USCA 109. (Emphasis added.)

Furthermore, as the court in *Daily Review Corp. v. Typographical Union* (E.D. N.Y.), June 30, 1950, 26 L.R.R.M. 2503, said in granting a motion to quash and set aside service of summons under Section 301 of the Act in a case where the International had no office in New York:

> "The defendant does not have an office or a representative in New York. *The defendant's local in New York is an autonomous body and defendant may not intervene or interfere in its affairs except when the local reaches an impasse on its relations with an employer,* and then only at the request of the local. When such a request is made, the defendant sends its representative to the district *merely to assist the local and the employer in arriving at an agreement."* (Emphasis added.)

This statement fairly represents the picture presented by this record with respect to the relation-

[24]Cited by appellee at pages 55-56 in its brief.

ship between the International and Local 16 and with respect to the functioning of Albright as an "International Representative." In the case at bar, as in the *Daily Review Corp.* case, *supra,* the local had reached an impasse in its relations with the employer, and the International Representative merely sought to assist the parties in reaching an agreement.

The other factors present in the *Daily Review Corp.* case are also present here—e.g., the principal office of the International is required to be in San Francisco, all of the books, records, funds, etc., are kept and maintained in San Francisco, and all of its officers reside there. Thus the "minimum contacts" concerning which appellee speaks[25] are not found on this record, and it would be a denial of due process to hold the International subject to the jurisdiction of the foreign court.

The contention that, by raising the question of lack of jurisdiction of the subject matter of the action at the same time as they raised the question of lack of jurisdiction over their person, appellants somehow defeated the operation of the foregoing rules and gave the Alaska court a jurisdiction which it did not have is not sound. Apart from the fact that it makes the determination of fundamental questions turn upon highly technical considerations, it is contrary to the well established rule that a jurisdictional defect is not cured by a general appearance and that, as a matter of fact, a jurisdictional defect is never cured and can be raised by the court on its own mo-

[25]Appellee's Brief, p. 57.

tion. This rule has been enunciated in cases dealing with unincorporated labor organizations as parties defendant over whom it was sought improperly to obtain jurisdiction.

Grant v. Carpenters District Council, 322 Pa. 62, 185 Atlantic 373.

Mitch v. United Mine Workers, 87 W.Va. 119, 104 S.E. 292.

And see cases cited at 149 A.L.R. 517.

CONCLUSION.

We do not feel that a useful purpose would be served by giving detailed consideration to those of appellee's points other than the ones to which we have replied here. Our reply has demonstrated that our contentions with respect to the trial court's misconceptions of the nature of the cause of action, and of its status as a court, are unanswerable. Accordingly, the judgment below should be reversed.

Dated, San Francisco, California,
November 15, 1950.

Respectfully submitted,
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No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONSHOREMEN'S AND WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,
Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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No. 12,527

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The petition for a rehearing of appellants herein respectfully alleges as follows:

I.

BY CONSTRUING SEC. 303(a)(4) IN ISOLATION FROM THE REST OF THE STATUTE, THE COURT REACHES A RESULT PLAINLY AT VARIANCE WITH THE LEGISLATIVE HISTORY AND THE CONGRESSIONAL PURPOSE IN ENACTING THE SECTION.

By its decision in this case, the Court has held that Section 8(b)(4)(D) of the Labor Relations Act,

and Section 303(a)(4) of the Act, are not addressed to the same conduct. In short, it has held that particular activities by a labor organization, while perfectly lawful under the portions of the Act defining unfair labor practices, are nevertheless unlawful and subject to suit for damages under a section of the Act whose meaning Congress intended to be identical with the unfair labor practice sections thereof.

In so holding, this Court adopts a construction of Section 303(a)(4) completely at variance with the meaning of that Section as advanced not only by appellants, but by appellee itself. It is to be recalled that in oral argument appellee conceded that if Section 10(k) gave the Board the right to determine which labor organization was entitled to the disputed work, the judgment of the trial court in its favor required reversal. This position followed from the recognition by appellee that Section 303(a)(4), having been derived from Section 8(b)(4)(D), and having been enacted solely to supplement the sanctions available for violations of that Section, made unlawful only such conduct as constituted an unfair labor practice under Section 8(b)(4)(D).

Because of the concession by the appellee that Section 303(a)(4) was identical in meaning with Section 8(b)(4)(D), appellants did not think it necessary to bring to the attention of the Court more than one portion of the clear and overwhelming legislative history that such was the case. The statement by Representative Lesinski that "* * * employers are given a cause of action [in Sec. 303] to recover any damages caused

by the activities made unfair by Section 8(b)(4)",[1] was but a single instance of unanimous Congressional intention to the same effect which appears in the Legislative History of the Labor Management Relations Act (hereinafter called "Legislative History"). Throughout the debate in the Senate on the amendment of Senator Taft, which became Section 303 of the Act, not only Senator Taft himself, but all other Senators who spoke, both in favor of or against the amendment, were unanimous in considering the purpose of the amendment as simply to create an additional remedy in damages for activities which constituted unfair labor practices under Section 8(b)(4). These excerpts from the Legislative History are set forth in the margin.[2]

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[1]Legislative History of the Labor Management Relations Act. Vol. 1, p. 912, quoted in our Opening Brief, p. 37.

[2]"Mr. Pepper. Mr. President, I had assumed that the Ball amendment and the Taft amendment had both, in defining the boycott or the jurisdictional strike, employed substantially the same language as is used in section 8 of the bill, where those things are made an unfair labor practice. It just dawned on me that the Senator has made it unlawful—not an unfair labor practice, but he has made it unlawful to engage in a boycott or in a jurisdictional strike. * * *

"* * * was it the desire of the Senator from Ohio to make those acts unlawful?

"Mr. Taft. That is correct. *I may say that the definition is exactly the same as the definition we had of an unfair labor practice.* The effect of making it unlawful is simply that a suit for damages can be brought for that kind of thing. There is no criminal penalty of any sort." (Emphasis added.) (Legislative History, Vol. 2, p. 1371.)

"Mr. Pepper. * * *

"In addition to that, the Senator from Ohio proposes to make the basis of a substantive suit at law for damages what the bill

In the face of this overwhelming evidence of legislative intention, the Court has nevertheless held that Section 303(a)(4) does not cover the same conduct as that proscribed by Section 8(b)(4)(D). The justification offered for such a holding is simply that the plain language of the Section requires it. The diffi-

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in its principal capacity describes as an unfair labor practice. * * *" (Legislative History, Vol. 2, p. 1390.)

"Mr. Murray. * * *

"The bill as reported by the committee already outlaws the activities in question by making them unfair labor practices, and even enables the National Labor Relations Board to obtain an immediate injunction while it is conducting a hearing on the issue. We are led to believe that the only question that now remains is whether we should add to these sanctions the suit for damages contemplated by the amendment offered by the Senator from Ohio, or the damage suit, injunction, and antitrust prosecution contained in the amendment offered by the Senator from Minnesota. * * *" (Legislative History, Vol. 2, p. 1366.)

"Mr. Ball. I am sorry; if the Senator from Michigan will read subsection (1) of section 10 of the committee bill, on page 33, he will find that no hearing is required. There is simply an investigation by a regional attorney. In any event, *we are defining very clearly, in this amendment and in the pending bill, secondary boycotts and jurisdictional strikes and the definition is the same.* We are defining clearly what we want to make unlawful. * * *" (Emphasis added.) (Legislative History, Vol. 2, p. 1352.)

"Mr. Pepper. I do not want to leave the Senator under a misapprehension. I am not in favor of the damage suit part of the amendment. I do not see anything to be gained by declaring such an act to be unlawful in any respect. If the Senator wishes to give the commission of some acts legal significance and make them the subject of a suit for damages, he can do so without running the risk of becoming involved with the question of criminal prosecution by leaving out the delaration of unlawfulness altogether and either calling it an unfair labor practice, as we do in the body of the bill, or simply say that the commission of such acts shall be the basis for suits in the Federal courts.

Mr. Taft. Is not that what I do when I say that it shall be unlawful for the purposes of this section? Does not that cover the case? It is not unlawful for any other purpose." (Legislative History, Vol. 2, p. 1374.)

culty with this position of the Court is that it ignores the very authorities on statutory construction applied by this Court in another portion of its opinion in this case. As this Court said in discussing the question of whether the trial court was a "district court of the United States" within the meaning of Section 303:

> "Upon at least two occasions the Supreme Court refused to construe the literal language of statutes in a manner which would disregard and thereby frustrate the obvious purpose and policy of the legislation involved and produce unreasonable or absurd results. We adopt the rationale of the rule applied in these cases." (Opinion, p. 12.)

The following language from *U. S. v. American Trucking Associations,* 310 U.S. 534, 543-4, which was quoted by the Court in the margin of its opinion, is particularly applicable here:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is avail-

> able, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination' * * *''

It is submitted that this salutary rule of statutory construction should be applied in the Court's determination of the meaning of Section 303(a)(4). The reasons for utilizing that rule in an aspect of this case dealing with procedure are present with even more force in the construction of a section which lays down substantive law. Surely the results of the construction of Section 303(a)(4), which this Court reaches by relying on its "plain language", are unreasonable in the light of the Legislative History we have cited. Further, such construction is plainly at variance with the purpose of Congress, explained in detail in the several briefs filed by appellants, to resolve jurisdictional disputes on their merits, rather than to outlaw them indiscriminately. (Opening Brief, pp. 43-48; Reply Brief, pp. 10-11.) This policy is not even discussed by the Court in its Opinion, yet it is effectively frustrated by the Court's holding, for under it unions can be penalized, even though they comply with a determination of the Board concerning who is entitled to disputed work.

The "plain language" construction adopted by the Court ignores the policy of Congress expressed in Section 10(k) to encourage parties to jurisdictional disputes to comply with the Board's determination of them.[3]

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[3]Section 10 (k) provides: "Upon compliance by the parties to the dispute with the decision of the Board * * *, such charge shall be dismissed."

In *Los Angeles Building & Construction Trades Council (Westinghouse Electric Corp.)*, 94 N.L.R.B. No. 63, 28 L.R.R.M. 1058, decided by the Board since the decision here was rendered, the Board again construed Section 10(k) to mean that a strike, covered by the "plain language" of Section 8(b)(4)(D), which occurs prior to a Board determination of the dispute under 10(k), does not constitute a violation of Section 8(b)(4)(D).[4]

According to the Board, only a strike which occurs after a 10(k) determination adverse to the striking union can violate Section 8(b)(4)(D). Under the

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[4]Earlier in the case, the Board had issued a 10 (k) determination adverse to the labor organizations involved, against which 8 (b) (4) (D) charges had been filed. (83 N.L.R.B. 477.) A hearing then took place on the question of whether the respondent unions had committed the unfair labor practice defined in Section 8 (b) (4) (D). Based on that hearing, which did not consider events following the Board's 10 (k) determination, the Trial Examiner found that Section 8 (b) (4) (D) had been violated. The Board remanded the case to the Trial Examiner, stating in the course of its order:

> "The Respondents contended, inter alia, that they had complied with the Board's 10 (k) determination in this case. No evidence with respect to such compliance or noncompliance was adduced at the hearing before the Trial Examiner.
>
> "We are of the opinion that the intent of Congress was that the General Counsel should allege and prove noncompliance with our 10 (k) determination in 8 (b) (4) (D) proceedings. Accordingly, we shall reopen the record in this case, and remand it to the Trial Examiner to give the General Counsel an opportunity to amend his pleadings and to introduce evidence to sustain his burden of proof." (Footnotes omitted.)

Thereafter, following an additional hearing, the Trial Examiner again found that the respondent unions had violated Section 8 (b) (4) (D), basing his finding on a strike called by the union *before* the Board's 10 (k) determination had been made. In reversing the Trial Examiner's finding, the Board said:

> "Clearly, the strike *before* the determination cannot prove noncompliance with the determination."

There being no evidence that the strike had continued after the 10 (k) determination, the Board dismissed the complaint.

Opinion in this case, however, the unions exonerated by the Board could be found liable in damages for the strike which had occurred before the Board's 10 (k) determination, and yet had ceased upon such determination. Such a result does not encourage compliance with the Board's resolution of the dispute. It does not, as Congress intended, give an employer an additional remedy for activities which are unlawful under the Labor Relations Act; on the contrary, it creates a new sanction which Congress never intended to create against lawful, primary, concerted activities.

II.

THE COURT'S CONSTRUCTION OF SECTION 303(a)(4) LEADS TO RESULTS INCONSISTENT WITH THE ADMINISTRATION BY THE NATIONAL LABOR RELATIONS BOARD OF SECTION 8(b)(4)(D).

In its Opinion, this Court avoids a determination of the correctness of the interpretation by the Board of Section 8(b)(4)(D), of which the abovementioned case is the latest example. This is done on the ground that, under the facts of this case, the Board could not fail to make a determination under 10(k) which was adverse to appellants here, and hence could not fail to agree that a strike by appellants was unlawful.

It is submitted that such a view simply begs the question. The real question that this Court must decide, and which it has failed to do, is whether a strike *before* a 10(k) determination is lawful under Section 8(b)(4)(D) and yet unlawful under Section 303(a)

(4). The Court must determine whether, in the face of the "plain language" of Section 8(b)(4)(D), the Board is correct in holding that a strike within its terms, which takes place before an adverse determination under section 10(k), is lawful. In the light of the intent of Congress to make Section 8(b)(4)(D) and Section 303(a)(4) identical in meaning, the strike by appellant Local 16 against appellee, during the period before the Board's determination adverse to it, could not possibly be lawful under Section 8(b)(4)(D) and unlawful under Section 303(a)(4). Either the principle laid down by the Board that the strike was lawful before the determination is incorrect, and this Court should so hold, or the judgment of the trial court to the contrary is erroneous, and should be reversed. A reliance on the "plain language" of Section 303(a)(4) to avoid such a determination leads this Court to the very unreasonable results and frustration of Congressional purpose that are condemned by the authorities on statutory construction previously cited, to which this Court adheres.

III.

THE COURT CONFUSES THE QUESTION OF WHAT CONDUCT IS PROHIBITED BY SECTION 303(a)(4) WITH THE QUESTION OF WHEN AN ACTION BASED ON THE SECTION CAN BE MAINTAINED.

As we explained at length in our Opening Brief, had Congress intended unqualifiedly to penalize strikes of the character involved here and in the *Los Angeles*

Building Council case, it would have adopted the proposals of the House with reference to jurisdictional disputes. (Opening Brief, pp. 43-48.) Instead, as we have demonstrated, it intended to make strikes in connection with such disputes unlawful only when persisted in after the Board had determined that the work in question did not belong to employees represented by the striking union. It is for this reason that Court action under Section 303(a)(4) must await Board action under Section 10(k). Unless a determination under Section 10(k) has occurred, no criterion exists by which to determine whether the activities in question are lawful or unlawful. After the Board's 10(k) determination has been made, a strike by a union will either remain lawful, or become an unfair labor practice and actionable, depending upon the determination. If the Board determines that the striking union is entitled to the work in question, it would be absurd to hold that a strike to seek such work was unlawful. Conversely, it is only when a strike is commenced or continues in the face of an adverse Board determination under 10(k) that it is unlawful, under either Section 8(b)(4)(D), or Section 303(a)(4).

It is respectfully submitted that the Court overlooks this fundamental relationship between Section 10(k) and Section 303(a)(4) when it states that "nowhere in the Legislative History do we find any indication of an intention to have such civil action for damages await the outcome of proceedings of the National Labor Relations Board. The plain purpose was to provide direct court action by the injured

party as a further deterrent against engaging in the prohibited conduct." (Opinion, page 19.) We have agreed with the Court that actions for damages under Section 303 need not await cease and desist orders of the Board under Section 8(b)(4), but may proceed simultaneously with, or even before, Board hearings on 8(b)(4) complaints. (Reply Brief, pp. 18-19.) But a Board complaint cannot issue under Section 8(b)(4)(D) until a Board determination under Section 10(k) has taken place. Similarly, until a Board determination adverse to the union is made under Section 10(k), the conduct addressed by Section 303(a)(4) is not prohibited. Were it otherwise, a union that the Board had held was entitled to disputed work could be sued for seeking to require employer compliance with the Board's award.

The legislative history relied on by the Court is consistent with this analysis. That history demonstrated two things: (1) that the conduct prohibited by Section 303(a)(4) was to be determined by the meaning of Section 8(b)(4)(D); (2) that actions could take place under Section 303(a)(4), based on the conduct prohibited by Section 8(b)(4)(D), before a Board order under 8(b)(4)(D) had been issued.

IV.

THE FAILURE OF CONGRESS EXPRESSLY TO RELATE SECTION 303 (a) (4) TO SECTION 10 (k) IS EXPLAINABLE BY THE ORIGIN OF THE FORMER SECTION.

Section 303, of which 303(a)(4) was a part, was added as an amendment by Senator Taft to the bill as reported by the committee, during the Senate debate on the bill. As the debate in the Senate shows, inadequate attention was given to the problem of drafting the language of the Taft amendment so as to make it consistent with the unfair labor practice definitions from which it was taken.[5]

In view of these circumstances, the "plain language" of Section 303(a)(4) should be no more determinative of its meaning than was the "plain language" of Section 303(b) referring to "any district court of the United States". In holding the trial court to be included within the meaning of that term, this Court went beyond the plain meaning which that term is given in the Judiciary Code (28 U.S.C.A.), and examined the theory and policy of the Act, as well as the provisions of the Act *as a whole*. It should do no less with Section 303(a)(4). If this is done,

---

[5] "Mr. Morse. * * *

"If the Senator will indulge me, may I say further that I think all the discussion, the amendments that are now proposed, and the corrections that have been made here on the floor of the Senate to the pending amendment, show that here is a problem that ought to be referred for further study to the committee proposed in another section of the committee bill. I think the pending Taft amendment is a perfect example of hastily devised legislation. I think the problem involved in it ought to go back to committee. I think we ought to take the committee bill and stop muddying the water, so to speak, by adding more and more amendments to it." (Legislative History, Vol. 2, pp. 1380-1381.)

then there can be no doubt that the conduct prohibited by Section 303(a)(4) is not defined by that Section alone, but by the Section construed together with Section 10(k), as is the case with Section 8(b)(4)(D).

V.

CONCLUSION.

To borrow the words of this Court in another portion of its Opinion, "no plausible or acceptable reason has been suggested * * * as a basis for the conclusion that Congress intended to create" in Section 303(a)(4) an action for damages for conduct which was perfectly lawful under Section 8(b)(4)(D), with which Section 303(a)(4) was intended to be identical. We have demonstrated that the separation which the Court has made between the two sections cannot be justified in the light of the unambiguous legislative history and purpose of both sections. Because of the unreasonable results "plainly at variance with the policy of the legislation as a whole" produced by the language of Section 303(a)(4) taken in isolation, such language should yield to the purpose of the section, which was to prohibit the same conduct defined by Section 8(b)(4)(D).

By virtue of the position it has taken, this Court has not determined whether the Board's construction of 8(b)(4)(D), upon which appellants rely, is correct. If it is, the judgment of the trial court is erroneous, since it has held to be unlawful, conduct which

is lawful under Section 8(b)(4)(D). It is respectfully submitted that this Court should grant appellants' petition for a rehearing to consider and decide whether the conduct proscribed by Section 8(b)(4)(D) is that which the Board has determined to be the case, and, following such determination, should render its opinion that the judgment of the trial court must be reversed.

Dated, San Francisco, California,
June 1, 1951.

Respectfully submitted,
GLADSTEIN, ANDERSEN & LEONARD,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
ALLAN BROTSKY,
WILLIAM L. PAUL, JR.,
Attorneys for Appellants and Petitioners.

Certificate of Counsel.

It is Hereby Certified that in the judgment of the undersigned, the foregoing petition for a rehearing is well-founded, and is not interposed for delay.

Dated, San Francisco, California,
June 1, 1951.

Allan Brotsky,
Of Counsel for Appellants and Petitioners.

No. 12528

United States
Court of Appeals
for the Ninth Circuit.

THE GRUEN WATCH COMPANY,

Appellant.

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GIBSON, DUNN & CRUTCHER

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FREDERIC H. STURDY

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634 S. Spring St.
Los Angeles 14, Calif.

TAFT, STETTINIUS & HOLLISTER

603 Dixie Terminal Bldg.
Cincinnati 2, Ohio

For Appellees Artists Alliance, Inc., et al:

MITCHELL, SILBERBERG & KNUPP

603 Roosevelt Bldg.
Los Angeles 14, Calif.

For Appellee Bulova Watch Company, Inc.:

LOW & STONE

301 Jewelers Exchange Bldg.
747 S. Hill St.
Los Angeles 14, Calif.

In the District Court of the United States for the Southern District of California, Central Division

Civil Action No. 9919-Y

THE GRUEN WATCH COMPANY, an Ohio Corporation,

Plaintiff,

vs.

ARTISTS ALLIANCE, INC., a California Corporation, LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually, LESTER COWAN, dba Lester Cowan Productions, BULOVA WATCH COMPANY, INC., a New York Corporation Doing Business in California, DOE I, DOE II, DOE III, DOE IV, DOE V and DOE VI,

Defendants.

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR INJUNCTION, DAMAGES AND EXEMPLARY DAMAGES

Comes now the plaintiff, The Gruen Watch Company, an Ohio corporation, and for grounds of complaint against the defendants herein, and each of them, complains and alleges as follows: [2*]

I.

Plaintiff is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of Ohio; defendent Artists Alli-

*** Page numbering appearing at bottom of page of original Reporter's Transcript.**

ance, Inc., is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of California; defendant Lester Cowan is and at all times herein mentioned was a citizen of the State of California and is and at all times herein mentioned was doing business in the State of California under the name "Lester Cowan Productions"; the true character or capacity of the defendant Lester Cowan Productions is unknown, but this plaintiff is informed and believes and therefore alleges that said Lester Cowan Productions is and at all times herein mentioned was organized and existing under the laws of the State of California and doing business in the State of California; defendant Bulova Watch Company, Inc., is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of New York and is and at all times herein mentioned has been present and doing business in the State of California. Defendants Doe I, Doe II, Doe III, Doe IV, Doe V and Doe VI are designated by fictitious names because their true names and capacities are unknown to plaintiff; plaintiff is informed and believes and therefore alleges that they are and each of them is a citizen of a State other than Ohio and plaintiff will ask leave of Court to substitute the true names and capacities of such defendants by amendment as soon as such true names are discovered. Defendants Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III and Doe IV and each of them will for convenience hereinafter sometimes be referred to as "de-

fendants Cowan." Defendants Bulova Watch Company, Inc., Doe V and Doe VI and each of them will for convenience hereinafter sometimes be referred to as "defendants Bulova." The matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00) [3]

II.

On and for some time prior to May 24, 1948, Walter E. Kline was an agent of plaintiff, acting on behalf of plaintiff, at Los Angeles, California. On or about said date, the defendants Cowan advised the said Kline of the said defendants' plans and intentions to make a feature length motion picture in which the Marx Brothers would be co-starred, and further advised the said Kline that certain scenes and sequences in the motion picture would be devoted to the activities of one or more of the said Marx Brothers in connection with various advertising displays. On or about the same date said defendants Cowan requested the said Kline to obtain from any noncompeting advertisers represented by him, agreements in connection with the said defendants' use of signs and displays advertising the products of said noncompeting advertisers. Plaintiff was then among the advertisers represented by the said Kline, but the defendants Bulova were not. Plaintiff is informed and believes and therefore alleges that at said time the script of said motion picture did not contain a clock sequence or stunt but that the said Kline prior to the signing of the memorandum of agreement, hereinafter referred to

in Paragraph IV, conceived the clock sequence or stunt which was ultimately used by defendants Cowan, and also suggested the idea of a clock of his client Gruen being used in connection therewith.

III.

Thereafter at said special instance and request of said defendants Cowan, the said Kline obtained from plaintiff an agreement for defendants Cowan to use in said motion picture a sign and display advertising plaintiff's products, upon the condition and understanding that the shots of plaintiff's said special sign and display would be used and displayed in said motion picture. Said Kline thereupon advised defendants Cowan of his receipt from plaintiff of said agreement, and said defendants thereupon agreed with plaintiff that in consideration of plaintiff's authority and permission to use plaintiff's [4] said contemplated special sign and display in said motion picture and in consideration of plaintiff's constructing and paying the cost of said sign and display, said defendants would use said sign and display in said motion picture.

IV.

Concurrently with the agreement referred to in Paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants

Cowan would bear the cost of said sign and display. At the same time it was understood and agreed between plaintiff and the defendants Cowan that defendants Cowan would bear the cost of said sign and display if said motion picture was not released to the general public prior to January 1, 1950.

V.

Thereafter and between about June 22, 1948, and about July 3, 1948, plaintiff and defendants Cowan executed memorandum of agreement dated June 22, 1948, which said memorandum was intended to and did embody directly and by reference, the said prior oral agreements of the parties. The "agreement" referred to in Paragraph 2 of said memorandum dated June 22, 1948, was and is the agreement set out in Paragraph III hereof. That portion of paragraph 4 of said memorandum which provided that defendants Cowan would pay plaintiff for the sign or display in the event said sign or display was "not actually included in the picture," was intended to and did express the parties' additional concurrent understanding and agreement set out in Paragraph IV hereof. A copy of said memorandum of agreement dated June 22, 1948, is attached hereto, marked Exhibit "A" and is hereby referred to and made a part hereof as though here set forth at length.

VI.

The Marx Brothers, known as Chico, Harpo and Groucho, are comedians of international renown, and the feature length motion picture "Love

Happy" starring them was and is expected to be and in the normal course of events will be seen by many millions of people in the United States and throughout the world, and the rights of the plaintiff acquired under the aforesaid agreements were and are unique and of great value. The Gruen line of watches manufactured by plaintiff is one of the leading brands of watches in the United States and throughout the world, and plaintiff spends annually in advertising its products hundreds of thousands of dollars, and defendants Cowan, by virtue of said agreements, acquired valuable rights from plaintiff, to wit, the right to use plaintiff's sign and display, including its nationally advertised name and products, in the said motion picture.

VII.

In compliance with the provisions of the hereinabove mentioned agreements, plaintiff, at its own cost, caused to be constructed and delivered to defendants Cowan a specially designed advertising sign and display consisting of a large sign bearing a neon illuminated clock, swinging pendulum, and the words "Gruen Watch Time." In addition to the actual cost of construction, plaintiff expended a substantial amount of time, thought and effort in the conception and design of said special sign and display, and said special sign and display was actually conceived by, was the original idea of the plaintiff, and was and is the property of the plaintiff. Said plaintiff's special sign and display was, pursuant to said agreements, used by defendants

Cowan in the County of Los Angeles, State of California, in the production of said motion [6] picture starring the Marx Brothers, which picture originally was entitled "Hearts and Diamonds" but which thereafter was and now is entitled "Love Happy." The filming of that portion of said motion picture, which included plaintiff's said sign and display, was completed on or about the end of August, 1948, and the said sign and display of plaintiff, having fully served the purposes of said agreements and of defendants Cowan, was thereupon returned by defendants Cowan to plaintiff's possession in Los Angeles, and said sign and display has been in its possession at all times since. At no time did plaintiff authorize defendants Cowan to use or utilize plaintiff's said special sign and display except for the purpose of advertising plaintiff's products through the medium of said motion picture; nor did plaintiff ever authorize defendants Cowan to permit any competitor of plaintiff to use or utilize or obtain any benefit from the use of plaintiff's said special sign and display.

VIII.

After the defendants Cowan had used plaintiff's said special sign and display in the production of said motion picture, the said defendants Cowan encouraged and permitted Life Magazine, a nationwide weekly publication, and one Slim Aarons, a professional photographer employed by said Life Magazine, to take photographs of said sign and display and provided Aarons and Life Magazine with

other photographs of said sign and display which were actually taken from the motion picture film. Concurrently therewith defendants Cowan advised plaintiff of their plan and desire to obtain publicity for their said motion picture from Life Magazine and plaintiff, acting solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was satisfactory and was in and would remain in said motion picture, authorized and permitted the said defendants to release said photographs for publication. Defendants Cowan thereupon, and with full knowledge of plaintiff's said understanding and belief, released all of said photographs for publication, all for the sole purpose of publicizing and promoting said defendants' motion picture "Love Happy." [7]

IX.

Thereafter and under the date of September 10, 1948, defendants Cowan wrote plaintiff a letter and enclosed therewith the photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit "B," and is hereby referred to and made a part hereof as though here set forth at length.

X.

Thereafter and under date of October 4, 1948, defendants Cowan wrote plaintiff an additional letter and enclosed therewith the additional photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto,

marked Exhibit "C," and is hereby referred to and made a part hereof as though here set forth at length. In reliance upon the prior agreements, representations and actions of defendants Cowan, plaintiff released said photographs for publication in jewelers' trade papers and said photographs were actually published therein, and likewise in reliance upon said agreements, representations and actions of defendants Cowan, plaintiff advised its dealers throughout the United States that Gruen would be advertised in said defendants' motion picture. Said release to the jewelers' trade papers and said advice to plaintiff's dealers throughout the United States gave valuable publicity to the said defendants and their motion picture. Plaintiff would not have made said releases to jewelers' trade papers nor given said advice to its dealers except for its understanding and belief theretofore induced by the agreements, representations and actions of defendants Cowan that its special advertising sign and display was and would be in the said motion picture.

XI.

Thereafter, and with the knowledge and permission of defendants Cowan, Life Magazine published in its issue dated February 7, 1949, a four-page article including (9) photographs or shots [8] stated as being from "The Marx Brothers forthcoming motion picture 'Love Happy.'" Said article likewise made certain other statements and representations to the general public, all as is more particularly set forth in said article and in the captions

of the said photographs. A copy of the table of contents page, and of said news article and the photographs therein contained, is attached hereto, marked Exhibit "D," and is hereby referred to and made a part hereof as though here set forth at length. Plaintiff is informed and believes and therefore alleges that prior to said publication, the defendants Cowan knew or had good reason to know that they would not use the name Gruen in their said motion picture, but they failed to advise either Life Magazine or the plaintiff of said fact.

XII.

By their acts of authorizing and permitting the release of the said Life Magazine article and the two said photographs which depicted the Gruen name and display, defendants Cowan represented to the public and to plaintiff that said Gruen name and display would be in said forthcoming motion picture, which said defendants Cowan had previously represented to plaintiff (by their letter dated October 4, 1948) would have its world premiere on February 12, 1949, only five days after said Life Magazine publication on February 7, 1949, and by their said acts the said defendants represented to the public and to plaintiff that the photographs reproduced in said Life Magazine article constituted a portion of the final version of the motion picture "Love Happy" and that said photographs would be contained in said motion picture when it was released to the general public.

XIII.

After completion of said motion picture, and after said release of said Life Magazine article and photographs under date of February 7, 1949, and after plaintiff had released said publicity for the said motion picture to jewelers' trade papers and to plaintiff's dealers, defendants Cowan demanded that plaintiff pay them the sum of [9] at least Twenty-Five Thousand Dollars ($25,000.00) cash, allegedly to be used by said defendants for the purpose of jointly advertising said defendants' motion picture and plaintiff's products in national advertising, and defendants Cowan advised plaintiff that unless plaintiff complied with said demand said defendants Cowan would not only remove from the motion picture any and all shots of the display provided by plaintiff but in addition would substitute in their place shots advertising the product of one of plaintiff's major competitors in the watch industry. Said removal and substitution were threatened, and thereafter carried out, by defendants Cowan arbitrarily, wilfully, maliciously, in bad faith and for the purpose of exacting an additional financial contribution from plaintiff over and above that called for by the agreements of the parties, and for the purpose of injuring the business and good will of plaintiff. Plaintiff refused to comply with said demand. Plaintiff is informed and believes and therefore alleges that while defendants Cowan were making said threats and demands upon plaintiff, they and defendants Bulova were already, but without the knowledge

of plaintiff, negotiating to substitute Bulova's name in said motion picture in place of plaintiff's name.

XIV

Plaintiff is informed and believes and therefore alleges that prior to the commencement of the negotiations referred to in Paragraph XIII hereof, defendants Bulova were aware of the obligations of defendants Cowan to plaintiff and of the facts set forth in Paragraphs II, III, IV, V, VI, VII, VIII and XI hereof, but defendants Bulova nevertheless induced defendants Cowan to disregard their obligations to plaintiff and to enter into and carry out a contract with defendants Bulova, whereby, for a monetary consideration (the precise amount of which is unknown to plaintiff), paid by defendants Bulova to defendants Cowan, the said defendants Cowan would delete the name Gruen from the motion picture "Love Happy" and would [10] substitute in said motion picture the name Bulova in place of the name Gruen. That said acts of defendants Bulova were all committed with the purpose and intent thereby to deprive plaintiff of the expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will.

XV.

Thereafter, under date of April 20, 1949, defendants Cowan notified plaintiff that they had elimi-

nated and would not use in the motion picture "Love Happy" any reference to plaintiff. Plaintiff has at all times refused to acquiesce in said notification and at all times has insisted that defendants Cowan must retain plaintiff's name and special sign and display in said motion picture and must remove the name Bulova from plaintiff's said special sign and display. Plaintiff notified defendants Bulova of its said position as soon as it learned of the negotiations between defendants Cowan and defendants Bulova, and said notification took place prior to the ultimate world premiere referred to in Paragraph XVII hereof.

XVI.

Despite the lack of authority of defendants Cowan, of which lack of authority defendants Bulova were fully aware, and in wilful and malicious derogation of plaintiff's rights in the premises, the defendants herein and each of them have conspired to commit and actively aided and abetted each other in the commission of the following acts:

(1) The defendants altered the motion picture containing plaintiff's said specially constructed sign and display in a material respect, to wit, by removing the name "Gruen" therefrom; and

(2) They actually included plaintiff's said special sign [11] and display in the motion picture as released to the general public but inserted the name "Bulova" in plaintiff's said sign and display in place of and in lieu of the name "Gruen."

Said two acts just referred to, in so far as defendants Bulova are concerned, were committed with the purpose and intent thereby to deprive plaintiff of the reasonably expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will.

XVII

Subsequent to the filing of the original complaint herein, said motion picture "Love Happy" had what was advertised as its world premiere showing. The special advertising sign and display, which was conceived, constructed and paid for by plaintiff, has been used and "actually included" in the final version of said motion picture, but the name "Gruen" has been erased from said film by the defendants and in place thereof, the name "Bulova" has been inserted. Plaintiff is informed and believes and therefore alleges that despite the threats of defendants Cowan, to which reference is made in Paragraph XIII hereof, the said defendants Cowan would not have erased the name "Gruen" from said motion picture save and except for the fact that they were induced so to do by defendants Bulova. Plaintiff is informed and believes and therefore alleges that said motion picture now is being released and shown by defendants Cowan at motion picture theatres throughout the United States, that unless restrained and enjoined from so doing, said defend-

ants will continue to release and show said motion picture, including plaintiff's said display which has been mutilated and distorted as aforesaid; and, further, that defendants and each of them also are carrying out a nationwide program jointly advertising said motion [12] picture and Bulova products; and that unless restrained and enjoined from so doing, the defendants and each of them will continue to carry out such advertising program.

XVIII.

As a result of the aforesaid actions and threatened actions by the defendants, great, irreparable and continuing injury and damage is being inflicted and will continue to be inflicted upon plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will: (1) through the loss of unique and valuable advertising which plaintiff reasonably expected to receive, was entitled to receive and would have received if defendants Bulova had not induced defendants Cowan to breach their obligations to plaintiff (2) through the ridicule to which plaintiff has been and will continue to be subjected by the jewelry trade and the public if defendants are permitted to continue to show said motion picture containing plaintiff's special sign and display but with Bulova's name inserted therein as hereinabove alleged or are permitted to continue to advertise jointly said picture and Bulova's products as hereinabove alleged; and (3) through defendants' mutilation, distortion and use of plaintiff's said specially

designed and conceived sign and display to the advantage and profit of the defendants and each of them without plaintiff's consent and in derogation of plaintiff's rights. Unless restrained and enjoined by this Court, the defendants and each of them will continue to commit said damaging acts.

XIX.

Plaintiff has no plain, adequate or speedy remedy at law in connection with the foregoing. [13]

XX.

As a direct and proximate result of the actions of the defendants and each of them as foresaid, plaintiff has lost and is losing world-wide advertising of very unique and substantial value, and has lost and is losing the value of the unique stunt and special sign and display conceived by plaintiff, and plaintiff and plaintiff's business, competitive position, dealer relationships, reputation and good will have likewise heretofore been and are being substantially damaged. Said damages are of such character as to be difficult of ascertainment and computation, but plaintiff estimates that it has already been damaged in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

XXI.

All of the aforesaid actions of defendants and of each of them were wilful, malicious and oppressive and by virtue of such wilfulness, malice and oppression plaintiff is entitled to recover damages for

the sake of example and by the way of punishing the defendants and each of them in the additional sum of One Hundred Thousand Dollars ($100,000.00).

Wherefore, plaintiff prays:

(1) That defendants, Lester Cowan, Artists Aliliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be ordered to delete the name "Bulova" from said motion picture and to restore the name "Gruen" therein, and that they be enjoined permanently from again removing said name "Gruen" therefrom.

(2) That defendants, Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be enjoined permanently from including in said motion picture "Love Happy" any shots of any display advertising in any way the products of defendant Bulova [14] Watch Company, Inc., or of any other competitor of plaintiff.

(3) That defendants, Bulova Watch Company, Inc., Doe V and Doe VI and the agents and servants of each of them be enjoined permanently from advertising their products jointly with the motion picture "Love Happy" and from using plaintiff's said display in said picture or at all.

(4) That plaintiff recover of and from the defendants and from each of them the sum of One

Hundred Thousand Dollars ($100,000.00), general damages, and such additional sums as may have accrued to the date of the injunction hereinabove prayed for.

(5) That plaintiff recover of and from the defendants and from each of them the additional sum of One Hundred Thousand Dollars ($100,000.00), as exemplary or punitive damages.

(6) That defendants pay to plaintiff the costs of this action, and

(7) That plaintiff have such other, different and further relief as may be just.

TAFT, STETTINIUS & HOLLISTER.

GIBSON, DUNN & CRUTCHER,

HENRY F. PRINCE,

FREDERIC H. STURDY,

RICHARD E. DAVIS,

By /s/ FREDERIC H. STURDY,

Attorneys for Plaintiff. [15]

EXHIBIT "A"

Webster 6156 Established 1918

Walter E. Kline
Public Relations

8445 Melrose Avenue Hollywood 46, California

June 22, 1948

Lester Cowan Productions
General Service Studios
1049 North Las Palmas
Hollywood, California

Gentlemen:

In confirmation of our present understanding it is hereby agreed as follows:

1. You have advised me of your plans and intentions to produce a feature length sound and talking motion picture presently entitled "Hearts and Diamonds," in which the Marx Brothers will be co-starred. You have further advised me that certain scenes and sequences in the picture will be devoted to the activities of one or more of the Marx Brothers in connection with various advertisings and displays.

2. Pursuant to your request therefor I have obtained from the hereinafter specified advertisers agreements in connection with your use of their respective signs and displays. Such advertisers and their signs and displays are as follows:

a. The General Petroleum Corporation whose advertising sign displays the "Flying Red Horse"

in connection with its sale of Mobilgas.

b. The Fisk Tire Company whose advertising sign displays a boy and a candle bearing the slogan "Time to Retire."

c. The Brown and Williamson Tobacco Corporation (Kool Cigarettes), Ted Bates Agency. [16]

d. The Gruen Watch Company.

e. One or more other companies using advertising signs or displays which may hereafter be included in the terms of this agreement by our mutual written statement to that effect.

3. You understand that some expense will be incurred by me or my principals in preparing for your use the above specified advertisements or displays. On behalf of my respective principals I am privileged to state that the cost of constructing such signs and displays which will be borne by my respective principals provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public; and further provided that such picture is actually released to the general public not later than January 1, 1950.

4. It is therefor understood and agreed that you will bear the cost incurred in connection with the construction and erection of any or all of such signs or displays which are not actually included in the picture substantially in the manner presently represented to you; it being further understood that you will bear the cost of all of such signs and displays if the said picture is not released to the gen-

eral public prior to January 1, 1950. At your request, of course, we shall furnish you with an itemized statement of all costs so incurred.

If the above is in accordance with your understanding of our agreement, please indicate the same by signing in the space provided therefor below.

Very truly yours,

/s/ WALTER E. KLINE.

Approved and Accepted:
LESTER COWAN
PRODUCTIONS,

An Artists Alliance, Incorporated, Production, Produced by Lester Cowan.

By /s/ LESTER COWAN. [17]

EXHIBIT "B"

Phone GRanite 3111
Artists Alliance, Inc.
1040 North Las Palmas
Hollywood 38, California
September 10, 1948

Mr. H. L. Nations
Public Relations Director
Gruen Watch Company
Time Hill
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find some 4x5 photographs of the action of the Gruen Watch sign in the current Lester Cowan production, "Love Happy." The sign gets a

tremendous play in the picture and you will note that Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film.

In connection with this tieup, if you care to do so, send me watches which can be prominently used in connection with the picture and we will photograph them on the wrists of Vera-Ellen, Marion Hutton, and Ilona Massey, the three feminine stars of the film, and the three Marx Brothers which you may have to use as you see fit.

Kindest regards.

Cordially,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm
Encl. [18]

EXHIBIT "C"

Phone GRanite 3111

Artists Alliance, Inc.
1040 North Las Palmas
Hollywood 38, California

October 4, 1948

Mr. H. L. Nations
Public Relations Director
Gruen Watch Company
Time Hill
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find photographs of Harpo Marx

swinging on the pendulum of the Gruen Watch sign. This is as closeup a shot as we could make and still show the sign.

Fred Kline of Walter Kline's office has mentioned that he has discussed a co-operative newspaper campaign with you in conjunction with the showing of this picture. If you have any details, I would appreciate same. Our first release date on the picture will be Lincoln's birthday with a world premiere in Cincinnati, followed by dates in Detroit, Chicago and New York. In all probability we will have Vera-Ellen, Ilona Massey and possibly the Marx brothers for personal appearances with the premiere.

Would also appreciate hearing your reaction to the brochure sent you regarding the proposed special train.

Kindest regards.

Sincerely,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm [19]

LIFE

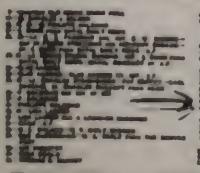
Vol. 28, No. 6 February 7, 1950

CONTENTS

LIFE'S COVER

This week Life's cover carries a title which will seem oppose on book jackets in more than 15 languages when publishers in more than 20 countries bring out the full version of *Their Finest Hour*. The first of seven installments in which Life is presenting highlights of the second volume of Winston Churchill's War Memoirs begins on page 58. Volume I, which was serialized in Life last year, set publishing records wherever the book appeared. In the U.S. half a million copies have been sold, and in Great Britain the censure first edition of more than 200,000 copies sold out the first day of publication.

The following two pages by page, shows the sources from which each picture in this issue was gotten. Where a single page is indicated by several numbers, reader is reminded pictures by pictures left to right, top to bottom and then by how those represented by dashed entries otherwise specified.



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Kindest regards.

Sincerely,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm [19]


MOVIES
HIGH ABOVE TIMES SQUARE
HARPO MEETS FISK FIRE BOY,
MATCHES YAWN FOR YAWN

swinging on the pendulum of the Gruen Watch sign. This is as closeup a shot as we could make and still show the sign.

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Sincerely,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm [19]

THE CHASE BEGINS when Harpo blithely drops from blonde jewel thief's bedroom window using parachute he has improvised hastily from a bed canopy.

HAIRBREADTH HARPO

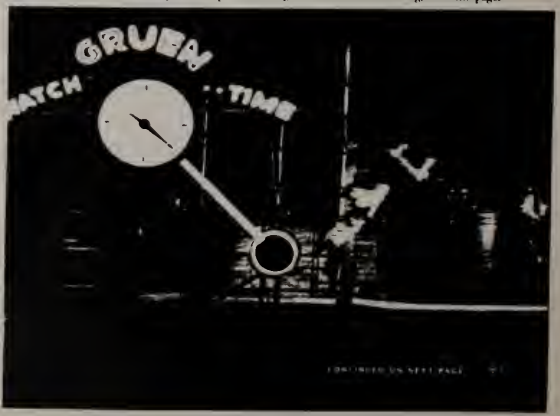
He eludes villains in neon chase

The Marx Brothers' forthcoming movie *Love Happy* has its full quota of traditional Marx shenanigans with Groucho as an astigmatic "private eye," Chico a spectacularly unsuccessful mind reader and mute Harpo a chestnut-vending bum. But best of all it has one of the finest chases since Harold Lloyd took up window-ledge teetering 30 years ago. In the chase Harpo, pursued by a gang of jewel thieves, careens across the rooftops of Times Square (Hollywood version) until rescued by one of the giddiest manifestations of the advertising age, the Square's huge electrical advertising signs. The film, in which Harpo is almost the whole show, may be the last displaying all three brothers. Groucho is busy on a radio program and piano-playing Chico traipses around on personal appearance tours, so from here on Harpo will probably have to ride alone.

RIDING HIGH after caroming off the running lights of a Wheaties sign, Harpo is carried upward by Mobilgas' flying horse as it blinks to sign's top. Then he leaps to another sign (*below*).

SWINGING LOW, he bobs crazily as he clings to the over-size Gruen clock pendulum (*above*). When dizziness sets in he lets go, is catapulted through the air. For his landing, turn the page.

HARPO TEETERS giddily on a building ledge high above Times Square as jewel thief's three henchmen momentarily catch up with him. He gets away.



CONTINUED ON NEXT PAGE

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Would also appreciate hearing your reaction to the brochure sent you regarding the proposed special train.

Kindest regards.

Sincerely,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm [19]

FLYING TOWARD THE PENGUIN, he soars straight into bird's mouth and plops inside among all the smoke-making machinery. Loaded with smoke, he finally staggers out to the roof where the thugs pounce on him again.

HARPO ERUPTS after being punched in the stomach by a thug who gets a face full of Kool smoke for his trouble. Gleefully making skillful use of his new-found secret weapon, Harpo downs the other thugs with smoke bursts.

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Sincerely,

/s/ R. E. ARMSTRONG,
Dir. of Publicity & Adv.

REA/vm [19]

THE WINNER STANDS AMONG THE SKYSCRAPERS
PROUDLY SHOOTING SMOKE FROM BOTH CAT

Receipt of copy acknowledged.
[Endorsed]: Filed Nov. 28, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTIONS TO DISMISS AND TO STRIKE FROM SECOND AMENDED AND SUPPLEMENTAL COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES.

To Plaintiff and to Messrs. Gibson, Dunn & Crutcher, Henry F. Prince, Frederic H. Sturdy, Richard E. Davis and Taft, Stettinius & Hollister, plaintiff's attorneys:

Please Take Notice that on the 23rd day of January, 1950, at the hour of 2:00 p.m., of said day, in the court room of the Honorable Leon R. Yankwich, United States Post Office and Court House Building, Los Angeles, California, the undersigned defendants will move the Court as follows:

I. To dismiss the second amended and supplemental complaint on file herein on the ground that it fails to state a claim upon which relief can be granted;

II. To strike from said second amended and supplemental complaint each of the following portions thereof upon the ground that each of [26] said portions is immaterial.

A. That portion of paragraph II (page 3, lines 4-14) reading as follows:

> "On or about said date, the defendants Cowan advised the said Kline of the said defendants'

plans and intentions to make a feature length motion picture in which the Marx Brothers would be co-starred, and further advised the said Kline that certain scenes and sequences in the motion picture would be devoted to the activities of one or more of the said Marx Brothers in connection with various advertising displays. On or about the same date said defendants Cowan requested the said Kline to obtain from any noncompeting advertisers represented by him, agreements in connection with the said defendants' use of signs and displays advertising the products of said noncompeting advertisers."

B. That portion of paragraph II (page 3, lines 15-22) reading as follows:

"Plaintiff is informed and believes and therefore alleges that at said time the script of said motion picture did not contain a clock sequence or stunt but that the said Kline prior to the signing of the memorandum of agreement, hereinafter referred to in paragraph IV, conceived the clock sequence or stunt which was ultimately used by defendants Cowan, and also suggested the idea of a clock of his client Gruen being used in connection therewith."

C. All of paragraphs III (pages 3-4).

D. All of paragraph IV (page 4).

E. That portion of paragraph V (page 4, lines 21-28), reading as follows:

"The 'agreement' referred to in Paragraph 2 of said memorandum dated June 22, 1948, was and is the agreement set out in Paragraph III hereof. That portion of paragraph 4 of said [27] memorandum which provided that defendants Cowan would pay plaintiff for the sign or display in the event said sign or display was 'not actually included in the picture,' was intended to and did express the parties' additional concurrent understanding and agreement set out in Paragraph IV hereof."

F. That portion of paragraph VII (page 5, lines 22-26), reading as follows:

"In addition to the actual cost of construction, plaintiff expended a substantial amount of time, thought and effort in the conception and design of said special sign and display, and said special sign and display was actually conceived by, was the original idea of the plaintiff, * * *."

G. All of paragraph VIII (page 6).

H. All of paragraph IX (page 7).

I. That portion of paragraph X (page 7, lines 9-14), reading as follows:

"Thereafter and under date of October 4, 1948, defendants Cowan wrote plaintiff an additional letter and enclosed therewith the additional photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit 'C,' and is

hereby referred to and made a part hereof as though here set forth at length."

J. That portion of paragraph X (page 7, lines 14-28), reading as follows:

"In reliance upon the prior agreements, representations and actions of defendants Cowan, plaintiff released said photographs for publication in jewelers' trade papers and said photographs were actually published therein, and likewise in reliance upon said agreements, representations and actions of defendants Cowan, plaintiff advised its dealers throughout the United States that Gruen would be advertised in said defendants' motion picture. Said release to the jewelers' trade [28] papers and said advice to plaintiff's dealers throughout the United States gave valuable publicity to the said defendants and their motion picture. Plaintiff would not have made said releases to jewelers' trade papers nor given said advice to its dealers except for its understanding and belief theretofore induced by the agreements, representations and actions of defendants Cowan that its special advertising sign and display was and would be in the said motion picture."

K. All of paragraph XI (pages 7-8).

L. All of paragraph XII (page 8).

M. That portion of paragraph XIII (pages 8-9, lines 28-9), reading as follows:

> "After the completion of said motion picture, and after said release of said Life Magazine article and photographs under date of February 7, 1949, and after plaintiff had released said publicity for the said motion picture to jewelers' trade papers and to plaintiffs' dealers, defendants Cowan demanded that plaintiff pay them the sum of at least Twenty Five Thousand Dollars ($25,000.00), cash, allegedly to be used by said defendants for the purpose of jointly advertising said defendants' motion picture and plaintiff's products in national advertising, and defendants Cowan advised plaintiff that unless plaintiff complied with said demand said defendants Cowan would not only remove from the motion picture any and all shots of the display provided by plaintiff but in addition would substitute in their place shots advertising the product of one of plaintiff's major competitors in the watch industry."

N. That portion of paragraph XIII (page 9, lines 9-14), reading as follows:

> "Said removal and substitution were threatened, and thereafter carried out, by defendants Cowan arbitrarily, wilfully, maliciously, [29] in bad faith and for the purpose of exacting an additional financial contribution from plaintiff over and above that called for by the agree-

ments of the parties, and for the purpose of injuring the business and good will of plaintiff."

O. That portion of paragraph XIII (page 9, lines 14-19), reading as follows:

> "Plaintiff refused to comply with said demand. Plaintiff is informed and believes and therefore alleges that while defendants Cowan were making said threats and demands upon plaintiff, they and defendants Bulova were already, but without the knowledge of plaintiff, negotiating to substitute Bulova's name in said motion picture in place of plaintiff's name."

P. That portion of paragraph XVI (page 10, line 22), reading as follows:

> "Despite the lack of authority of defendants Cowan, * * *"

Q. That portion of paragraph XX (page 13, lines 5-6), reading as follows:

> "* * * and has lost and is losing the value of the unique stunt and special sign and display conceived by plaintiff, * * *"

R. That portion of paragraph XX (page 13, lines 6-9), reading as follows:

> "* * * and plaintiff and plaintiff's business, competitive position, dealer relationships, reputation and good will have likewise heretofore been and are being substantially damaged."

S. All of paragraph XXI (page 13).

Said motions are based upon the second amended and supplemental complaint on file herein, upon this notice of motion, upon the memorandum of points and authorities attached hereto, upon the memoranda of points [30] and authorities heretofore filed in support of defendants' motions to dismiss the original complaint and the first amended and supplemental complaint and upon all the pleadings and papers on file herein.

MITCHELL, SILBERBERG & KNUPP and

LEONARD A. KAUFMAN,

By /s/ LEONARD A. KAUFMAN,

Attorneys for defendants, Artists Alliance, Inc., Lester Cowan and Lester Cowan d/b/a Lester Cowan Productions.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 30, 1949. [31]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

To Plaintiff and to Messrs. Gibson, Dunn & Crutcher, Henry F. Prince, Frederick H. Sturdy, Richard E. Davis and Taft, Stettinius & Hollister, plaintiff's attorneys:

Please Take Notice that on the 23rd day of January, 1950, the hour of 2:00 p.m. of said day, in the court room of the Honorable Leon R. Yankwich, United States Post office and Court House Building, Los Angeles, California, the undersigned defendants will move the Court as follows:

I. To dismiss the second amended and supplemental complaint on file herein on the ground that it fails to state a claim upon which relief can be granted; [33]

Said motion is based upon the second amended and supplemental comlaint on file herein, upon this notice of motion, upon the memorandum of points and authorities attached hereto, upon the memorandum of points and authorities heretofore filed in support of defendants' motions to dismiss the original complaint and the first amended and supplemental complaint and upon all the pleadings and papers on file herein, and defendant, Bulova Watch Company, Inc., a New York corporation, joins in the "Motions to Dismiss and to strike from Second

Amended and Supplemental complaint" heretofore filed by defendants, Cowan, and upon the Memorandum of Points and Authorities filed therewith.

Defendant, Bulova Watch Company, Inc., is not at this time moving for a change of venue since it believes that such a motion is premature before a cause is at issue. Defendant, Bulova, further reserves the right to file a motion for change of venue at such future time as shall be appropriate.

Dated: January 3, 1950.

LOW & STONE,

By /s/ LEONARD LOW,

Counsel for Defendant, Bulova Watch Company, Inc., a New York Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 3, 1950. [34]

[Title of District Court and Cause.]

ORDER ON MOTIONS

The various motions heretofore argued and submitted, are now decided as follows:

1. The motion of the defendants, Artists Alliance, Inc., and Cowan to dismiss the amended Complaint is granted. Plaintiff may amend within twenty days after date.

2. The motions of the same defendants to strike and for a more definite statement are denied.

3. The motion of Bulova Watch Co. to quash service of summons is denied. Said defendant may have twenty days to answer any amended Complaint to be filed.

Comment

(A) The contract from which the action stems, was made in California by the advertising representative of the plaintiff, evidently a resident of California, and the defendant Cowan, also a resident. It is, therefore, a California contract. The action being based on diversity of citizenship, is governed by California law and policy. [36] See, Angel v. Bullington, 1947, 330 U. S. 183.

It is the law of California, dating to Boyson v. Thorn, 1893, 98 C. 578, that bad faith cannot turn the exercise of a legal right into an actionable wrong. Scudder Food Products v. Ginsberg, 1943, 21 C(2) 596, 601; Monahan v. Dept. of Water & Power, 1941, 48 C(2) 746, 755. Under certain circumstances, however, inducing breach of a contractual relation may be actionable. Katz v. Kapper, 1935, 7 C. A. (2) 1; Imperial Ice Co. v. Rossier, 1941, 18 C(2) 33.

The contract between the plaintiff and Cowan, through the plaintiff's advertising agent, called merely for construction of advertising signs and displays. If they were used in the "final version" of a certain motion picture, the cost would be borne by the plaintiff. If not "actually included in the picture," or the picture was not released prior to

January 1, 1950, the cost would be borne by Cowan. (The only penalty for not using the display is liability for price.)

But this is not what the Complaint seeks to recover. And, granting that the new rules establish notice pleading, there still must be stated facts which show legal liability. I find none in the Complaint.

(Cowan was free to do what he pleased with the property if he paid for it.) Its use under another name is not the libel of goods or business recognized by law. See, Yankwich, Essays in the Law of Libel, 1929, p. 64; 33 Am. Jur. Sec. 70.

(B) Bulova is clearly doing business in California. West Publishing Co. v. Superior Court, 1942, 20 C(2) 720; International Shoe Co. v. Washington, 1945, 326 U. S. [37] 310, 318; Nippert v. Richmond, 1946, 327 U. S. 416, 422. And the person served comes within the statutory designation. Cal. Code of Civil Procedure, Sec. 411; Cal. Civil Code, Sec. 406a.

Hence the rulings above made.

Dated this 7th day of October, 1949.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Oct. 7, 1949. [38]

In the United States District Court, Southern District of California, Central Division

No. 9919-Y

THE GRUEN WATCH COMPANY, an Ohio Corporation,

Plaintiff,

vs.

ARTISTS ALLIANCE, INC., a California Corporation, LESTER COWAN PRODUCTIONS, LESTER COWAN, etc., BULOVA WATCH COMPANY, INC., etc., et al.,

Defendants.

DECISION ON MOTIONS

The various motions of the defendants, heretofore submitted, are now decided as follows:

(1) The motion of the defendants Artists Alliance, Inc., Lester Cowan, and Lester Cowan, doing business as Lester Cowan Productions, to dismiss the second amended and supplemental complaint as to them, is hereby granted.

(2) The motion of the same defendants to strike certain portions from the second amended and supplemental complaint is granted.

(3) The motion of the defendant Bulova Watch Company, Inc., to dismiss the complaint as to them is granted.

Formal order dismissing said complaint to follow.

Costs to the defendants. [39]

I.

Introductory Statement of Facts

Action by the plaintiff to recover general damages in the sum of $100,000.00 and punitive damages in an equal sum and injunction. The defendants have moved to dismiss and to strike portions of the amended and supplemental complaint.

The basis for asserted liability against the defendant Cowan is that, contrary to the agreement, to be referred to hereinafter, they appropriated an advertising display made by the plaintiff to be used in a motion picture to be made by Cowan, and placed the name of Bulova on it and used it in the picture with the Bulova name. The amended complaint avers that, in anticipation of use of the plaintiff's name, Cowan released advertising material indicating such use.

Bulova is charged with inducing Cowan to disregard its obligations under the agreement and to replace their name by its name and use the plaintiff's property for their benefit, without authorization and in violation of its undertaking.

By such action the plaintiff (1) lost valuable advertising which it would have received from the use of its name, (2) was and will be subjected to ridicule by the trade through use of its display under the Bulova name and (3) was injured by the mutilation of the design. [40]

Comment

Try as I might, I cannot see any foundation of liability in the second amended and supplemental complaint. By postulating ambiguity in the contract of June 22, 1948, and by supplying additional facts both anterior and posterior to its execution, plaintiffs think that they have overcome the deficiencies of the amended complaint dismissed on October 7, 1949. In this I think they are mistaken.

The essential part of the memorandum agreement, dated June 22, 1948, is contained in Paragraphs 3 and 4 of the same, which read:

"You understand that some expense will be incurred by me or my principals in preparing for your use the above specified advertisements or displays. On behalf of my respective principals I am privileged to state that the cost of constructing such signs and displays which will be borne by my respective principals provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public; and further provided that such picture is actually released to the general public not later than January 1, 1950.

"It is therefore understood and agreed that you will bear the cost incurred in connection with the construction and erection of any or all of such signs or displays which are not actually included in the picture substantially in the manner presently represented to you; it being further understood that you will bear the cost of all of such signs and displays if the said [41] picture is not released

to the general public prior to January 1, 1950. At your request, of course, we shall furnish you with an itemized statement of all costs so incurred."

These clauses mean that, in view of the fact that certain advertising signs required special outlays of moneys in their construction, Kline's principals—the plaintiff among them—will bear the cost of construction, provided they are included in the "final version" of the picture. If not, the only penalty is that the defendants would "bear the cost incurred in connection with the construction and erection" of the "signs and displays." By these undertakings, the parties have laid down the conditions of liability. And no atomizing of the phraseology or expository of references to "intentions," "undertakings" or "agreements" can destroy the binding finality of the simple, unequivocal obligation contained in these two paragraphs.

The circumstances under which courts will allow prior negotiations to be gone into in explanation of the terms of an agreement or permit subsequent conduct to become a criterion of contemporaneous interpretation are well known. While sitting on the Court of Appeals recently, I had occasion to write for the Court an opinion which states rather elaborately the law of California on this subject. (Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation, No. 12054, filed on December 2, 1949, publication of which in the Official Reports—Federal (2)—should reach counsel almost simultaneously with this memorandum. (And see, Barham v. Barham, 1949, 33 C(2) 416.)

Absent any ambiguity, the argument derived by analogy from the law of options and by which it is sought to construe certain acts of the defendants as an irrevocable exercise of choice, lose all significance. In an option, [42] a binding contract arises when the optionee exercises the right under the option. Until such time, the contract is open and because of the unilateral character of the contract, courts are very strict in holding the optionee to the binding effect of any acts on his part which amount to the exercise of his rights. Once he has done so, they do not allow him to change his position to the detriment of the optionor. (See, Bard v. Kent, 1942, 19 C(2) 448; Spaulding v. Yovino-Young, 1947, 30 C(2) 138; Warner Bros. Pictures, Inc. v. Brodel, 1948, 31 C(2) 766, 772-773; MacDonald v. Rosenfeld, 1948, 83 C.A. (2) 221, 237; Baker v. Kale, 1947, 83 C.A. (2) 89, 92-93), and, if necessary, the courts will, in applying these principles, invoke the doctrine of estoppel. But, even in option cases, the acts on the part of the optionee must be such that the court can see in them evidence "of the continuance of such mutuality of obligation." (Spaulding v. Yovino-Young, supra, p. 142.) Otherwise, there is no legal basis for carrying over the option agreement into a different relationship than that envisaged by the contract. Strictly speaking, we are not confronted here with an option—i.e., with a contract which gave the optionee "a right against the optionor for performance of the contract to which the option relates upon the exercise of the option." (Warner Bros. Pictures v. Brodel,

supra, p. 773.) The undertaking on the part of the representative of the plaintiff was that they would construct certain advertising displays or lay-outs—to use the newspaper phrase—and that, if Cowan incorporated them in their "final" picture, the cost would be borne by the advertiser. If not, the cost was to be borne by Cowan. The first line in Paragraph 3 recites that expenses are to be incurred "in preparing for your use," the advertisements and displays. So it seems to me that the inescapable conclusion is that stated in the [43] prior memorandum which summed up the agreement in the two sentences: "The only penalty for not using the display is liability for price. * * * Cowan was free to do what he pleased with the property if he paid for it."

Granted that if the parties themselves have not provided the penalty for failure to use the advertising displays in the form in which they were, i.e., with the name of the plaintiff on it, the plaintiff might seek damages upon one of the several theories propounded by them in defense of the present complaint, the obvious answer is that the parties made different provision. And the plaintiffs, after having entered into a contract which recites that, because certain advertising set-ups required the expenditures of money, if they were used in a manner beneficial to the plaintiff, Cowan would not have to pay for them, but if they were not, he is not free to insist now that he is entitled, on some general principles, to sue for defamation of goods, or injury to prospective goodwill, which might have resulted

had the advertising set-up been used with his name on it, and the like. The letters written subsequent to the execution of the contract did not alter the situation. Cowan had complete freedom of action, as between the two methods of benefitting from the contract, up to and including the actual incorporation and use of the set-up in the "final version" of the picture. Only the earnestness of counsel and their insistence that the additional facts of the second amended and supplemental complaint overcome the deficiencies of the amended complaint have led me to elaborate on the matter. I am of the view now—as I was at the time the prior decision was made—despite the leave to amend then granted—that the contract under consideration cannot be made the foundation of any liability [44] of the type which plaintiff seeks to establish. For this reason, the additional allegations add no issuable facts and the present complaint, stripped of these additional allegations, which seek to change the tenor of the agreement, does not and cannot be made to state a claim against the defendants Cowan.

What has just been said applies also to Bulova's motion to dismiss. At the present time, the law in California permits an action against a third party for wilful interference with a contractual relation. (See, Restatement: Torts, Sec. 768(2); Katz v. Kapper, 1935, 7 C.A.(2) 1; Imperial Ice Co. v. Rossier, 1941, 18 C (2) 33; Baker v. Kale, supra, p. 92-93; Romano v. Wilbur Ellis & Co., 1947, 82 C.A. (2) 670.) But the essential condition of liability is the inducement of a breach of contract.

Under the contract, as I interpret it, Cowan, when he determined not to use the advertising layout in the form proposed, i.e., with the name of the plaintiff on it, incurred only one liability, to pay for it. He would have incurred the same liability if, after including in it the final version of the picture, it had not been released prior to January 1, 1950.

So, here again, the only consequence of the non-user being stipulated in the contract, and being the cost of the layout, assuming that Bulova induced Cowan not to use the layout with the name of the plaintiff on it—we cannot fasten lability on Bulova on a theory of tortious interfering with a contractual relation. For, if, as we hold, the agreement called for the construction of these layouts for Cowan's use, their non-use with the plaintiff's name on it called, as the only penalty, liability for its cost—a different liability cannot be thrust upon either Cowan or Bulova because Cowan, having paid for the layout, was, as stated in the prior memorandum, "free to do what he pleased with it." And if Bulova induced him to do what [45] was his legal right to do, no liability as to it can flow from the act. (See, Sweeley v. Gordon, 1941, 47 C.A.(2) 385; Lynch v. Rheinschild, 1948, 86 C.A.(2) 672, 676; Orloff v. Metropolitan Trust Co., 1941, 17 C(2) 484, 488-489.)

Hence the rulings above made.

Dated this 27th day of February, 1950.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Oct. 7, 1949. [46]

At a stated term, to wit: The February Term, A.D. 1950, of the United States District Court within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 27th day of February, in the year of our Lord, one thousand nine hundred and fifty.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

MINUTE ORDER TO DISMISS

Court signs decision on motions heretofore submitted as follows: (1) motion of defendants Artists Alliance, Inc., and Lester Cowan, etc., to dismiss the second amended and supplemental complaint is granted; (2) motion of said defendants to strike portions of said complaint is granted; and (3) motion of defendant Bulova Watch Co., Inc., to dismiss said complaint is granted. [47]

In the District Court of the United States for the Southern District of California, Central Division.

No. 9919-Y—Civil

THE GRUEN WATCH COMPANY, an Ohio Corporation,

Plaintiff,

vs.

ARTISTS ALLIANCE, INC., a California Corporation, et al.,

Defendants.

ORDER OF DISMISSAL

The above action having come on regularly to be heard on February 20, 1950, upon the motions of defendants Artists Alliance, Inc., a California corporation, Lester Cowan Productions, Lester Cowan, individually, Lester Cowan, d/b/a Lester Cowan Productions and Bulova Watch Company, Inc., to dismiss said action, and the matter having been submitted to the Court for decision, the Court, being fully advised in the premises, does hereby hold that said motions should be granted upon the ground and for the reason that the second amended and supplemental complaint herein fails to state a claim upon which relief can be granted.

Wherefore, it is ordered, adjudged and decreed

that said action be and the same hereby is dismissed, defendants to have their costs.

Dated: March 6, 1950.

/s/ LEON R. YANKWICH,
Judge, District Court. [48]

Approved as to form:

TAFT, STETTINIUS & HOLLISTER,

GIBSON, DUNN & CRUTCHER,

HENRY F. PRINCE,

FREDERIC H. STURDY,

RICHARD E. DAVIS,

By /s/ FREDERIC H. STURDY,

Attorneys for Plaintiff,
The Gruen Watch Company.

[Endorsed]: Filed March 6, 1950.

Judgment entered March 8, 1950. [49]

United States District Court, Southern District of California, Central Division.

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Mitchell, Silberberg & Knupp, Esqs.,
603 Roosevelt Bldg.,
Los Angeles 14, Calif.

Gibson, Dunn & Crutcher, Esq.,

Henry F. Prince, Esq.,

Frederic H. Sturdy, Esq.,

Richard E. Davis, Esq.,

Taft, Stettinius & Hollister, Esqs.,

634 South Spring St.,
Los Angeles 14, Calif.

Re: The Gruen Watch Co. v. Artists Alliance, Inc., et al, No. 9919-Y.

You are hereby notified that Order of Dismissal has been entered this day in the above-entitled case, in Judgment Book No. 64, page 273.

Dated: Los Angeles, California, March 8, 1950.

EDMUND L. SMITH,
Clerk.

By /s/ C. A. SIMMONS,
Deputy Clerk. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Notice Is Hereby Given that the plaintiff in the above-entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order of Dismissal, dated March 6, 1950, and entered on or about March 8, 1950, granting the respective motions of defendants Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, Lester Cowan dba Lester Cowan Productions, and the Bulova Watch Company, Inc., to dismiss said action, and dismissing said action on the ground [51] that plaintiff's Second Amended and Supplemental Complaint fails to state a claim upon which relief can be granted, and from each and every part of said Order, and from each and every ruling of the Court with respect to said Second Amended and Supplemental Complaint.

Dated: April 3rd, 1950.

TAFT, STETTINIUS & HOLLISTER,

GIBSON, DUNN & CRUTCHER,

HENRY F. PRINCE,

FREDERIC H. STURDY,

RICHARD E. DAVIS,

By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 3, 1950. [52]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS

To the Clerk of the above-entitled Court:

To the defendants Artists Alliance, Inc., a California corporation, Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, dba Lester Cowan Productions, and to their attorneys: Messrs. Mitchell, Silberberg & Knupp and Leonard A. Kauffman, Esq., and

To the defendant, Bulova Watch Company, Inc., a New York corporation doing business in California, and to its attorneys: Messrs. Low and Stone and Leonard Low, Esq.: [54]

Designation of Record on Appeal

Plaintiff hereby designates as those portions of the record and proceedings to be included in the record on appeal the following:

1. Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary

Damages, including the exhibits attached thereto.

2. Notice of Motions of Defendants Artists Alliance, Inc., Lester Cowan and Lester Cowan, dba Lester Cowan Productions, to dismiss and to strike from Second Amended and Supplemental Complaint (not including, however, the Memorandum of Points and Authorities appended thereto.)

3. Notice of Motion of Defendant Bulova Watch Company, Inc., to dismiss Second Amended and Supplemental Complaint (not including, however, the Memorandum of Points and Authorities appended thereto.)

4. Decision on Motions, dated February 27, 1950, including the Comment appended thereto.

5. Minute Order dated February 27, 1950, re Decision on Motions.

6. Order of Dismissal dated March 6, 1950.

7. Notice by Clerk of Entry of Order of Dismissal dated March 8, 1950.

8. Notice of Appeal dated April 3, 1950, including date of filing.

9. This Designation of Record on Appeal and Statement of Points. [55]

STATEMENT OF POINTS

I.

The trial court erred in granting the motion of defendants Artists Alliance, Inc., a California cor-

poration, Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, dba Lester Cowan Productions, to dismiss the Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary Damages, for the reason that the said Complaint states a claim upon which all or some of the relief sought by said Complaint can be granted against said defendants.

II.

The trial court erred in granting the motion of defendant Bulova Watch Company, Inc., to dismiss the Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary Damages, for the reason that the said Complaint states a claim upon which all or some of the relief sought by said Complaint can be granted against said defendant.

III.

The trial court erred in granting the several motions of defendants Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, dba Lester Cowan Productions, to strike the following several portions of the Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary Damages, for the reason that each of said portions of said Complaint, respectively, was and is material:

(a) That portion of Paragraph II (page 3, lines 4-14) reading as follows:

> "On or about said date, the defendants Cowan advised the said Kline of the said de-

fendants' plans and intentions to make a feature length motion picture in which the Marx Brothers would be co-starred, and further advised the said Kline that certain scenes and sequences in the motion picture would be devoted to the activities of one or more of the said Marx Brothers in connection with various advertising displays. [56]

"On or about the same date said defendants Cowan requested the said Kline to obtain from any non-competing advertisers represented by him, agreements in connection with the said defendants' use of signs and displays advertising the products of said non-competing advertisers."

(b) That portion of Paragraph II (page 3, lines 15-22) reading as follows:

"Plaintiff is informed and believes and therefore alleges that at said time the script of said motion picture did not contain a clock sequence or stunt but that the said Kline prior to the signing of the memorandum of agreement, hereinafter referred to in Paragraph IV, conceived the clock sequence or stunt which was ultimately used by defendants Cowan, and also suggested the idea of a clock of his client Gruen being used in connection therewith."

(c) All of Paragraph III (pages 3 and 4) reading as follows:

"Thereafter at said special instance and re-

quest of said defendants Cowan, the said Kline obtained from plaintiff an agreement for defendants Cowan to use in said motion picture a sign and display advertising plaintiff's products, upon the condition and understanding that the shots of plaintiff's said special sign and display would be used and displayed in said motion picture. Said Kline thereupon advised defendants Cowan of his receipt from plaintiff of said agreement, and said defendants thereupon agreed with plaintiff that in consideration of plaintiff's authority and [57] permission to use plaintiff's said contemplated special sign and display in said motion picture and in consideration of plaintiff's constructing and paying the cost of said sign and display, said defendants would use said sign and display in said motion picture."

(d) All of Paragraph IV (page 4) reading as follows:

"Concurrently with the agreement referred to in Paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants Cowan would bear the cost of said sign and display. At the same time it was understood and agreed between plaintiff and the defendants Cowan that

defendants Cowan would bear the cost of said sign and display if said motion picture was not released to the general public prior to January 1, 1950."

(e) That portion of Paragraph V (page 4, lines 21-28) reading as follows:

"* * * The 'agreement' referred to in Paragraph 2 of said memorandum dated June 22, 1948, was and is the agreement set out in Paragraph III hereof. That portion of Paragraph 4 of said memorandum which provided that defendants Cowan would pay plaintiff for the sign or display in the event said sign or display was 'not actually included in the picture,' was intended to and did express the parties' additional concurrent understanding and agreement set out in Paragraph IV hereof."

(f) That portion of Paragraph VII (page 5, lines 22-26) reading as follows:

"In addition to the actual cost of construction, plaintiff expended a substantial amount of time, thought and effort in the conception and design and display, and said special sign and display was actually conceived by, was the original idea of the plaintiff, * * *"

(g) All of Paragraph VIII (page 6) reading as follows:

"After the defendants Cowan had used plain-

tiff's said special sign and display in the production of said motion picture, the said defendants Cowan encouraged and permitted Life Magazine, a nation-wide weekly publication, and one Slim Aarons, a professional photographer employed by said Life Magazine, to take photographs of said sign and display and provided Aarons and Life Magazine with other photographs of said sign and display which were actually taken from the motion picture film. Concurrently therewith defendants Cowan advised plaintiff of their plan and desire to obtain publicity for their said motion picture from Life Magazine and plaintiff, acting solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was satisfactory and was in and would remain in said motion picture, authorized and permitted the said defendants to release said photographs for publication. Defendants Cowan thereupon, and with full knowledge of plaintiff's said understanding [59] and belief, released all of said photographs for publication, all for the sole purpose of publicizing and promoting said defendants' motion picture 'Love Happy.' "

(h) All of Paragraph IX (page 7) reading as follows:

"Thereafter and under date of September 10, 1948, defendants Cowan wrote plaintiff a letter and enclosed therewith the photographs

referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit 'B,' and is hereby referred to and made a part hereof as though here set forth at length."

(i) That portion of Paragraph X (page 7, lines 9-14) reading as follows:

"Thereafter and under date of October 4, 1948, defendants Cowan wrote plaintiff an additional letter and enclosed therewith the additional photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit 'C,' and is hereby referred to and made a part hereof as though here set forth at length."

(j) That portion of Paragraph X (page 7, lines 14-28) reading as follows:

"In reliance upon the prior agreements, representations and actions of defendants Cowan, plaintiff released said photographs for publication in jewelers' trade papers and said photographs were actually published therein, and likewise in reliance upon said agreements, representations and actions of defendants Cowan, plaintiff advised its dealers throughout the United States that Gruen would be advertised in said defendants' motion picture. Said release to the jewelers' trade papers and said advice to plaintiff's dealers throughout the United States gave valuable publicity to the

said defendants and their motion picture. Plaintiff would not have made said releases to jewelers' trade papers nor given said advice to its dealers except for its understanding and belief theretofore induced by the agreements, representations and actions of defendants Cowan that its special advertising sign and display was and would be in the said motion picture."

(k) All of Paragraph XI (pages 7-8) reading as follows:

"Thereafter, and with the knowledge and permission of defendants Cowan, Life Magazine published in its issue dated February 7, 1949, a four-page article including nine (9) photographs or shots stated as being from 'The Marx Brothers forthcoming motion picture "Love Happy."' Said article likewise made certain other statements and representations to the general public, all as is more particularly set forth in said article and in the captions of the said photographs. A copy of the table of contents page, and of said news article and the photographs therein contained, is attached hereto, marked Exhibit 'D,' and is hereby referred to and made a part hereof as though here set forth at length. [61] Plaintiff is informed and believes and therefore alleges that prior to said publication, the defendants Cowan knew or had good reason to know that

they would not use the name of Gruen in their said motion picture, but they failed to advise either Life Magazine or the plaintiff of said fact."

(l) All of Paragraph XII (page 8) reading as follows:

"By their acts of authorizing and permitting the release of the said Life Magazine article and the two said photographs which depicted the Gruen name and display, defendants Cowan represented to the public and to plaintiff that said Gruen name and display would be in said forthcoming motion picture, which said defendants Cowan had previously represented to plaintiff (by their letter dated October 4, 1948) would have its world premiere on February 12, 1949, only five days after said Life Magazine publication on February 7, 1949, and by their said acts the said defendants represented to the public and to plaintiff that the photographs reproduced in said Life Magazine article constituted a portion of the final version of the motion picture 'Love Happy' and that said photographs would be contained in said motion picture when it was released to the general public."

(m) That portion of Paragraph XIII (pages 8-9, lines 29-9) reading as follows:

"After the completion of said motion picture, and after said release of said Life Maga-

zine [62] article and photographs under date of February 7, 1949, and after plaintiff had released said publicity for the said motion picture to jewelers' trade papers and to plaintiff's dealers, defendants Cowan demanded that plaintiff pay them the sum of at least Twenty-five Thousand Dollars ($25,000.00) cash, allegedly to be used by said defendants for the purpose of jointly advertising said defendants' motion picture and plaintiff's products in national advertising, and defendants Cowan advised plaintiff that unless plaintiff complied with said demand said defendants Cowan would not only remove from the motion picture any and all shots of the display provided by plaintiff but in addition would substitute in their place shots advertising the products of one of plaintiff's major competitors in the watch industry."

(n) That portion of Paragraph XIII (page 9, lines 9-14) reading as follows:

"Said removal and substitution were threatened, and thereafter carried out, by defendants Cowan arbitrarily, wilfully, maliciously, in bad faith and for the purpose of exacting an additional financial contribution from plaintiff over and above that called for by the agreements of the parties, and for the purpose of injuring the business and good will of plaintiff."

(o) That portion of Paragraph XIII (page 9, lines 14-19) reading as follows: [63]

> "Plaintiff refused to comply with said demand. Plaintiff is informed and believes and therefore alleges that while defendants Cowan were making said threats and demands upon plaintiff, they and defendants Bulova were already, but without the knowledge of plaintiff, negotiating to substitute Bulova's name in said motion picture in place of plaintiff's name."

(p) That portion of Paragraph XVI (page 10, line 22) reading as follows:

> "Despite the lack of authority of defendants Cowan, * * *"

(q) That portion of Paragraph XX (page 13, lines 5-6) reading as follows:

> "* * * and has lost and is losing the value of the unique stunt and special sign and display conceived by plaintiff, * * *"

(r) That portion of Paragraph XX (page 13, lines 6-9) reading as follows:

> "* * * and plaintiff and plaintiff's business, competitive position, dealer relationships, reputation and good will have likewise heretofore been and are being substantially damaged."

(s) All of Paragraph XXI (page 13) reading as follows:

> "All of the aforesaid actions of defendants and of each of them were wilful, malicious and

oppressive and by virtue of such wilfulness, malice and oppression plaintiff is entitled to recover damages [64] for the sake of example and by the way of punishing the defendants and each of them in the additional sum of One Hundred Thousand Dollars ($100,000.00)."

Dated: April 3rd, 1950.

TAFT, STETTINIUS & HOLLISTER,

GIBSON, DUNN & CRUTCHER,

HENRY F. PRINCE,

FREDERIC H. STURDY,

RICHARD E. DAVIS,

By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 4, 1950. [65]

DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL OF DEFENDANT-APPELLEES, ARTISTS ALLIANCE, INC., ET AL.

To the Clerk of the Above-Entitled Court:

Defendant-appellees, Artists Alliance, Inc., a California corporation, Lester Cowan Productions, Lester Cowan, individually and Lester Cowan d/b/a Lester Cowan Productions, designate, to be contained in the record on appeal, in addition to the contents designated by plaintiff-appellant, Order on Motions dated October 7, 1949, including the Comment appended thereto.

Dated: April 13, 1950.

MITCHELL, SILBERBERG & KNUPP and

LEONARD A. KAUFMAN,

By /s/ LEONARD A. KAUFMAN,

Attorneys for Defendant-Appellees, Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, Individually and Lester Cowan, d/b/a Lester Cowan Productions.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 13, 1950. [67]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 68, inclusive, contain the original Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary Damages; Notice of Motions to Dismiss and to Strike from Second Amended and Supplemental Complaint less Memorandum of Points and Authorities attached; Notice of Motion to Dismiss Second Amended and Supplemental Complaint less Memorandum of Points and Authorities attached; Order on Motions filed October 7, 1949; Decision on Motions filed February 27, 1950; Order of Dismissal; Notice of Entry of Judgment; Notice of Appeal; Designation of Record on Appeal and Statement of Points and Designation of Additional Portions of Record on Appeal and a full, true and correct copy of minute order entered February 27, 1950, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24th day of April, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12528. United States Court of Appeals for the Ninth Circuit. The Gruen Watch Company, Appellant, vs. Artists Alliance, Inc., Lester Cowan Productions, Lestern Cowan, individually, Lester Cowan, doing business as Lester Cowan Productions and Bulova Watch Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 26, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

THE GRUEN WATCH COMPANY, an Ohio Corporation,

Plaintiff-Appellant,

vs.

ARTISTS ALLIANCE, INC., a California Corpo- LESTER COWAN, Individually LESTER COWAN, dba Lester Cowan Productions, BULOVA WATCH COMPANY, INC., a New York Corporation, Doing Business in California, DOE I, DOE II, DOE III, DOE IV, DOE V and DOE VI,

Defendants-Appellees.

STATEMENT OF POINTS RELIED ON AND DESIGNATION OF MATERIAL PORTIONS OF RECORD ON APPEAL TO BE PRINTED.

To the Clerk of the above-entitled Court:

To the defendants Artists Alliance, Inc., a California corporation, Lester Cowan Productions, Lester Cowan, individually and Lester Cowan, dba Lester Cowan Productions, and to their attorneys: Messrs. Mitchell, Silberberg & Knupp and Leonard A. Kauffman, Esq., and

To the defendant, Bulova Watch Company, Inc., a New York corporation doing business in California, and to its attorneys: Messrs. Low and Stone and Leonard Low, Esq.:

Appellant hereby refers to and adopts in all respects as its Statement of Points on which it intends to rely on appeal and as its Designation of Record which it considers material to the consideration of the appeal, the "Designation of Record on Appeal and Statement of Points" dated April 3, 1950, and heretofore filed by plaintiff-appellant in the District Court on or about April 4, 1950, and requests the printing of the entire record, excepting and omitting therefrom only the "Order on Motions" filed the 7th day of October, 1949, (said Order being at pages 36, 37 and 38 of the original certified record), together with this Statement of Points Relied on and Designation of Material Portions of Record on Appeal to be Printed.

Dated: April 22, 1950.

TAFT, STETTINIUS & HOLLISTER,

GIBSON, DUNN & CRUTCHER,

HENRY F. PRINCE,

FREDERIC H. STURDY,

RICHARD E. DAVIS,

By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1950.

[Title of Court of Appeals and Cause.]

DEFENDANTS-APPELLEES' DESIGNATION OF ADDITIONAL MATERIAL PORTIONS OF RECORD ON APPEAL TO BE PRINTED.

To the Clerk of the above-entitled Court:

Defendants-Appellees, Artists Alliance, Inc., a California corporation, Lester Cowan Productions, Lester Cowan, individually; Lester Cowan, dba Lester Cowan Productions, designate as material to the consideration of this appeal, in addition to the contents designated by plaintiff-appellant, Order on Motions, dated October 7, 1949, including the comment appended thereto.

Dated: May 2, 1950.

MITCHELL, SILBERBERG & KNUPP and

LEONARD A. KAUFMAN,

By /s/ LEONARD A. KAUFMAN,

Attorneys for Defendants-Appellees Artists Alliance, Inc., a California Corporation, Lester Cowan Productions, Lester Cowan, Individually, and Lester Cowan, dba Lester Cowan Productions.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 3, 1950.

No. 12528

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLANT'S OPENING BRIEF.

TAFT, STETTINIUS & HOLLISTER,
603 Dixie Terminal Building, Cincinnati 2, Ohio,

GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCL,
FREDERIC H. STURDY,
RICHARD E. DAVIS,
634 South Spring Street, Los Angeles 14, California,

Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 12528

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This is an appeal from a final judgment dismissing plaintiff's Second Amended and Supplemental Complaint on the ground that it failed to state a claim on which relief could be granted [R. 51-52], entered March 8, 1950, in the United States District Court, Southern District of California, Central Division [R. 52-53], and from an order concurrently made, striking certain portions of said Complaint on motion of certain of the defendants [R. 50]. Notice of Appeal was filed April 3, 1950.

Jurisdiction of the District Court was based on diversity of citizenship, 28 U. S. C. 1332(a)(1), the plaintiff being an Ohio corporation [R. 2] and the defendants being citizens of California or New York [R. 3]. Jurisdiction of this Court on Appeal is based on 28 U. S. C. §1291, §1294(1).

Statement of the Case.

This action was brought to compel defendants to delete the name BULOVA and to restore the name GRUEN in a scene in a motion picture, and to recover damages arising from the substitution made in violation of plaintiff's contractual, business and property rights.

After plaintiff filed its Second Amended and Supplemental Complaint (hereinafter for convenience referred to as the Complaint) (1) all defendants moved to dismiss on the ground of failure to state a claim on which relief could be granted [R. 31-38] and (2) some of the defendants (but not defendant Bulova) moved to strike certain portions of the Complaint solely upon the ground that each of said portions was "immaterial" [R. 31-37]. The Court granted each of the motions [R. 50] and the correctness of these rulings is the sole issue on this appeal.

As will appear from our Argument, the correctness of the trial court's ruling on the motion to strike will be dependent upon this Court's ruling with respect to the grounds of recovery relied upon by plaintiff in seeking reversal of the judgment of dismissal. Hence, this brief will be devoted primarily to the motions to dismiss and only secondarily to the motion to strike.

The Complaint, including all exhibits, is of course set forth in full in the printed Transcript of Record [R. 2-29]. The Complaint (exclusive of the photostatic exhibit) is, for convenience, also set forth as an Appendix to this brief. Briefly, however, the Complaint may be summarized as follows:

In May, 1948, being about to produce a Marx Brothers motion picture, defendants Artists Alliance, Inc., Lester Cowan, and Lester Cowan Productions (referred to

in the Complaint as defendants Cowan and hereinafter for brevity referred to as the "producers" or "producer defendants") requested agreements from certain non-competing advertisers for the construction by such advertisers (including plaintiff Gruen) of special advertising signs and displays to be used in a certain scene in the motion picture. At that time the script for the motion picture did not contain a clock sequence or stunt but prior to entering any agreement, plaintiff's agent Kline conceived the sequence or stunt which was ultimately used by defendants [Compl. par. II; R. 4-5].

Thereafter, plaintiff orally agreed to construct and to permit the producers to use a sign and display advertising plaintiff's products, on condition that shots of such special sign and display would be used and displayed in the picture by said defendants [Compl. par. III; R. 5]. Concurrently it was orally agreed that in the event it became necessary to cut the scene containing plaintiff's display from the picture, or if the picture was not released to the general public before 1950, producers would pay the cost of the display [Compl. par. IV; R. 5-6]. Subsequently a written memorandum was executed which was intended to and did embody (both directly and by reference) the oral agreements just referred to. The memorandum was attached to the Complaint as Exhibit "A" [R. 20-22].

Plaintiff then constructed a specially designed advertising sign and display consisting of a large neon illuminated clock, swinging pendulum, and the words "Gruen Watch Time." This special sign and display was conceived by and was the original idea of plaintiff. In August, 1948, it was used by the producer defendants in filming the motion picture "Love Happy," and was then returned to

plaintiff. The only use of the sign which was ever authorized by plaintiff was its use "for the purpose of advertising *plaintiff's* products through the medium of said motion picture." [Compl. par. VII; R. 7-8.]

After using plaintiff's sign and display in the production of the picture, to publicize this motion picture, the producers sought and obtained plaintiff's permission to use photographs of plaintiff's sign taken from the film for publication in Life Magazine. Plaintiff consented to this special use solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was in and would remain in the film [Compl. par. VIII; R. 8-9]. Such photographs and a four-page article publicizing the motion picture actually appeared in Life Magazine [Exhibit "D" to Compl.; R. 25-29].

The producer defendants wrote plaintiff under date of September 10, 1948 [Exhibit "B" to Compl.; R. 22-23] and again under date of October 4, 1948 [Exhibit "C" to Compl.; R. 23-24] on each occasion sending plaintiff photographs of the action of "the Gruen Watch sign" in the film. In the first of these letters, the producers advised plaintiff among other things, "The sign gets a tremendous play in the picture and you will note that Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film" [R. 22-23], while in the second letter they advised plaintiff, among other things, "Our first release date on the picture will be Lincoln's Birthday with a world premiere in Cincinnati, followed by dates in Detroit, Chicago and New York." [R. 24.]

In reliance on the agreements and on the producers' representations and actions, and believing that its sign and display were definitely in the picture, plaintiff released publicity to its dealers and released the photographs (which producer defendants had sent it) for publication in jewelers' trade papers, which releases gave valuable publicity to the motion picture [Compl. par. X; R. 10].

After completion of the picture, and after the release of the Life Magazine article and photographs and after plaintiff's release of publicity to jewelers' trade papers and dealers, the producer defendants demanded that plaintiff pay at least $25,000.00 allegedly for the purpose of "jointly advertising" the motion picture and plaintiff's products and said defendants advised plaintiff that unless the money were forthcoming they would not only remove the shots of plaintiff's display from the picture, but would in addition substitute shots advertising the product of one of plaintiff's major competitors. Plaintiff refused to comply with this demand [Compl. par. XIII; R. 12-13].

Defendant Bulova was aware of the obligations of the producers to plaintiff and of the other facts above set forth, but nevertheless defendant Bulova induced the producers, for a monetary consideration, to disregard their obligations to plaintiff and to delete the name GRUEN from the motion picture and substitute the name BULOVA, all with the intention of unfairly interfering with and injuring plaintiff's business [Compl. par. XIV; R. 13]. The producers would not have erased plaintiff's name from the motion

picture except for defendant Bulova's inducements [Compl. par. XVII; R. 15].

Thereafter, on April 20, 1949, defendants Cowan notified plaintiff they had eliminated and would not use any reference to plaintiff in the motion picture [Compl. par. XV; R. 13-14].

Thereafter, without any authority from plaintiff, defendants (1) altered the motion picture containing plaintiff's specially constructed sign and display by removing the name "GRUEN" therefrom, and (2) actually included plaintiff's special sign and display in the motion picture as released to the general public but inserted the name "BULOVA" in plaintiff's sign and display in place of the name "GRUEN" [Compl. par. XVI; R. 14].

As a result of the foregoing actions of the defendants, continuing injury and damage is being inflicted upon plaintiff, its business, dealer relationships, competitive position, reputation and good will (1) through the loss of unique and valuable advertising which plaintiff was entitled to receive and would have received if defendant Bulova had not intervened, (2) through the ridicule which plaintiff has been and will be subjected in the trade, if defendants are permitted to continue to show the motion picture containing plaintiff's special sign but with BULOVA'S name inserted therein, and (3) through defendants' mutilation and use of plaintiff's specially designed and conceived sign and display to the advantage and profit of defendants with-

out plaintiff's consent and in derogation of plaintiff's rights [Compl. par. XVIII; R. 16-17].

On the foregoing facts, plaintiff asked for damages already sustained and for an injunction to prevent further misuse of its unique property [Compl. pars. XIX and XX; R. 17]. In addition, plaintiff charged that all of the acts of the defendants were wilful, malicious and oppressive for which reason punitive damages were likewise sought [Compl. par. XXI; R. 17-18].

With respect to producer defendants (defendants Cowan), the question is whether or not said defendants breached their contract with plaintiff or, even in the absence of such contract, whether they did not appropriate plaintiff's property right in a unique idea concretely embodied in its special sign and display. If the Complaint states such a claim against producer defendants it is equally clear that a similar claim is stated against defendants Bulova.

As to defendant Bulova, however, there is one further question presented, to wit: whether or not the Complaint states an additional claim for relief against said defendants for malicious interference with an advantageous business relationship, for such claim for relief may be sustained even if no binding contract existed between plaintiff and producer defendants.

The various theories of liability upon which plaintiff relies are more specifically set forth in the Specification of Errors immediately following and in the Argument.

Specification of Errors.

The Specification of Errors relied upon on this appeal and intended to be urged herein are:

I.

The trial court erred in granting the motion of the producer defendants to dismiss the Complaint for the reason that the Complaint does state a claim upon which all or some of the relief sought can be granted against said defendants, upon one or more of the following four (4) independent grounds or theories:

(1) Breach of an express contractual undertaking to use plaintiff's name and display in the motion picture as finally released. (See Argument, Point I.)

(2) Breach of implied covenants of good faith and to use plaintiff's name GRUEN in conjunction with plaintiff's display, if such display was used in the motion picture as finally released. (See Argument, Point II.)

(3) By their course of conduct, the producer defendants (a) elected to use plaintiff's name and display, or (b) are estopped to deny such election. (See Argument, Point III.)

(4) Wholly aside from plaintiff's contractual rights, producer defendants are liable for the wrongful and unauthorized use of plaintiff's display and the unique idea concretely embodied therein. (See Argument, Point IV.)

II.

The trial court erred in granting the motion of defendant Bulova to dismiss the Complaint for the reason that the Complaint does state a claim upon which all or some of the relief sought can be granted against said defendant, upon one or more of the following three (3) independent grounds or theories:

(1) Interference with plaintiff's contract with producer defendants. (See Argument, Point V.)

(2) Interference with plaintiff's advantageous business relationship with producer defendants. (See Argument, Point V.)

(3) Wholly aside from defendant Bulova's interference with plaintiff's contract or advantageous business relationship, said defendant is liable to plaintiff for the wrongful and unauthorized use of plaintiff's display and the unique idea embodied in said display. (See Argument, Point IV.)

III.

The trial court erred in granting the motion of producer defendants to strike the several portions of the Complaint to which said motion was directed, for the reason that each of said stricken portions was in fact material to one or more of plaintiff's theories upon which it based its claim for relief.

Each portion of the Complaint designated in the motion to strike, is set forth in full in plaintiff's Statement of

Points to be relied on appeal [R. 57-67]. In order that this Court may readily consider the motion to strike, we have set forth as an Appendix to this brief, the entire Complaint (exclusive of the photostatic exhibit), and have underscored the material which was stricken. In addition, immediately preceding each stricken allegation, we have set forth in brackets the capital letter which corresponds with the letter specification in the motion to strike. In this manner the stricken material may be readily considered in its context in the Complaint without unduly lengthening the brief.

ARGUMENT.

A consideration of this appeal cannot be made without reference at the outset to the following two important rules which are uniformly applied in the Federal Courts:

First, that a complaint will not be dismissed for failure to state a claim upon which relief can be granted which, when construed in the light most favorable to the plaintiff and with all doubts resolved in favor of its sufficiency, states a claim upon any theory upon which relief could be granted, F. R. C. P. 8(a), (e) and (f); *Leimer v. State Mutual Life Assurance Co.* (C. C. A. 8, 1940), 108 F. 2d 302, 304, 306; *Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.* (D. C. Cal., 1948), 79 F. Supp. 908; and

Second, that a motion to strike is not favored and will be granted only when the allegations have no possible relation to the controversy and, if the court is in doubt whether under any contingency the matter may raise an issue, the motion should be denied, *Radtke Patents Corporation v. C. J. Tagliabue Mfg. Co.* (D. C., N. Y., 1939), 31 F. Supp. 226; *Contogeorge v. Spyrou* (D. C., N. Y., 1946), 7 F. R. D. 223, 227, 228.

With these two rules as a background, we will now consider the several legal grounds upon which plaintiff claims relief.

I.

Plaintiff Is Entitled to Rely Upon All the Agreements and Acts Constituting the Entire Contract Alleged in the Complaint and Is Not Limited to the Letter Memorandum.

Plaintiff contends that the allegations of Paragraphs II, III, IV and V of the Complaint [R. 4-6] set forth a contract, the breach of which gave rise to a claim for relief. The District Court, however, declined to give effect to most of these allegations on the ground that evidence of the oral agreements therein alleged would be inadmissible in view of the letter memorandum referred to in Paragraph V and attached to the complaint as Exhibit "A".

We believe the entire agreement between the parties was properly set forth in the Complaint and that there are two separate reasons why plaintiff should be allowed to prove that part of the agreement which is extrinsic to the letter memorandum, acceptance of either of which reasons is sufficient to require reversal of the judgment below.

(1) The Letter Memorandum Is, on Its Face, Incomplete, and Parol Evidence of Contemporaneous Oral Agreements Not Inconsistent With the Memorandum May Be Introduced, Particularly Where, as Here, the Memorandum Specifically Refers to Those Agreements.

The letter memorandum contains four separate and distinct paragraphs, each dealing with its own subject matter.

Paragraph (1) of the memorandum deals with the "plans and intentions" of Cowan (the producer) with respect to producing a certain motion picture. [R. 20.]

Paragraph (2) of the memorandum deals with Cowan's "request" for certain "agreements" in connection with the

"use" of certain advertising signs and displays which Kline states he has obtained for Cowan pursuant to Cowan's request. [R. 20-21.] Despite the fact that these agreements in connection with Cowan's use of the signs go to the very heart of the transaction, *no* details thereof appear in the memorandum. It is obvious that these agreements dealing with the use of the signs should be before this court. The memorandum is a mere shell without them.

Paragraphs (3) and (4) of the letter memorandum of June 22, deal with an *entirely different* subject matter. [R. 21-22.] Neither of these paragraphs has anything to do with *anyone's* rights or obligations to use or permit the use of the signs and displays. On the contrary, they deal solely with an abstract proposition, to wit, which party is to bear the "cost of construction" if the signs "are included" and which is to bear such cost if the signs "are not actually included."

In other words, the language of Paragraphs (3) and (4) of the memorandum provide for the *results* which are to follow from inclusion or non-inclusion respectively, but they do not specify (a) whether one of the parties was to have the right of determining whether or not such inclusion was to take place, or (b) whether such determination was not in fact intended by the parties to be governed by matters beyond the control of either party. The language used is certainly not inconsistent with the second alternative, yet the trial court in sustaining defendants' motions to dismiss, ruled that the producer had an absolute right of determination and that the other alternative could not possibly be considered.

The unfair and unrealistic results which defendants are attempting to achieve, can and should be avoided by clari-

fying Paragraph (2) of the memorandum (the only paragraph of the memorandum dealing with "agreements" in connection with *"use"* of the signs) by introducing the terms of the contemporaneous oral agreement to the effect that the plaintiff Gruen authorized the use of its special sign and display in consideration of the producer's agreement to use it, and by clarifying Paragraphs (3) and (4) by reference to the further contemporaneous agreement that if through circumstances beyond the control of the producer defendants it became necessary to *cut* the scene containing plaintiff's sign and display from the picture (it would then not be "actually included" in the picture) the producer would bear the cost of constructing the sign and display. The agreement would thus be rendered an integrated and sensible whole and would cover, as it was intended to cover, the agreements between the parties with respect to *use*. It is submitted that these contemporaneous oral agreements are not inconsistent with anything in the memorandum.

The law on the matter of admission of contemporaneous oral understandings where the written agreement is incomplete or the oral agreement is not inconsistent with or at variance with the written agreement, is so well settled that the citation of the following two cases should suffice for purposes of illustration.

In *Simmons v. Cal. Institute of Technology* (1949), 34 Cal. 2d 264, 209 P. 2d 581, the Supreme Court of California said:

> "The promises of Dr. Clark were that the money, although *paid* to the Institute as a matter of administrative procedure, nevertheless was to be *used* exclusively for Impact Research. Therefore, the promise was directed to the matter of the *use* of the money,

whereas the terms of the memorandum dealt with nothing more than the *form of the payment* of it. These promises by Dr. Clark as to the use of the royalties were the fraudulent inducement, or motive, for the contract, but they were not incorporated in or superseded by the terms of the agreement as to payment. *The two are not inconsistent or 'at variance' inasmuch as they deal with wholly different matters.* It was, therefore, proper to receive parol evidence to prove the promises of Dr. Clark." (Emphasis added.)

Simmons v. Cal. Institute of Technology (1949), 34 Cal. 2d 264, 274, 209 P. 2d 581.

To the same effect:

Detsch & Co. v. American Products Co. (C. C. A. 9, 1945), 152 F. 2d 473, 474.

In addition, however, paragraph (2) of the memorandum makes specific reference to these "agreements." Since the parties themselves acknowledged the existence of these agreements and obviously did not consider them inconsistent with the rest of the memorandum, a court should not rule to the contrary, but should give effect to all portions of the agreement whether contained in the memorandum or referred to by it.

Several cases have given effect to this principle.

For example, in *Webb v. Cobb* (1926), 172 Ark. 255, 288 S. W. 897, 899, a building contract referred to work which should be done in keeping with "plans and specifications." The court approved the admission of parol evidence as to the "plans and specifications."

Kellogg v. Snell (1928), 93 Cal. App. 717, 270 Pac. 232, is also in point. This was an action upon a contract for the purchase of shares of a corporation. The con-

tract provided that the buyer would "accept a position with said bank under conditions otherwise agreed upon." The court allowed the introduction of parol evidence to prove this contemporaneous agreement, relying upon the language quoted above as a reference to this contemporaneous agreement.

Schmidt v. Cain (1928), 95 Cal. App. 378, 380, 272 Pac. 803, is another case similar to the one at bar. Therein was involved a sales contract which began with the following language:

> "In accordance with my verbal understanding I had with you at your office."

There was no mention in the contract of a warranty, but the buyer was allowed to prove such a warranty by parol evidence.

So in the case at bar, the memorandum is *absolutely silent as to who or what was to determine whether plaintiff's sign and display would or would not be included in the motion picture,* for which reason the contemporaneous oral agreement with respect to this point should have been considered by the court below.

(2) The Letter Memorandum of June 22, 1948, Contains Ambiguities and Uncertainties Which May and Should Be Resolved by a Consideration of Extrinsic Evidence.

We think it is well recognized that uncertainties and ambiguities commonly result when parties attempt to express themselves by means of a so-called "short letter" form of agreement. The letter memorandum involved in the present case is only two pages long, contains precisely forty-three lines, and is a good example of the deficiencies of such form of agreement. It contains several obvious

ambiguities and uncertainties which can only be clarified by reference to extrinsic evidence.

At the very outset, Paragraph (1) of the memorandum states that Cowan (the producer) has advised Kline of Cowan's "plans and intentions" with respect to a certain motion picture, but these plans and intentions are not set forth in the memorandum.

In the second place, in Paragraph (2) of the memorandum, reference is made to a "request" from Cowan but the memorandum gives no inkling as to the terms, extent or basis of Cowan's request. In the same Paragraph (2) we find reference to certain "agreements" in connection with Cowan's "use" of the signs and displays but no information as to the contents or terms of these "agreements" nor is the word "use" defined.

In the third place, in Paragraph (3) the word "included" appears, while in Paragraph (4), which dealt with the possibility of exclusion, the phrase "not *actually* included" is used. The use of the adverb "actually" was not accidental, and an opportunity to ascertain the reason for its presence should have been allowed. On its face, the word emphasizes the state of mind of the contracting parties in view of their concurrent oral agreement dealing with the possibility of the actual cutting of the scene from the picture.

Lastly, in Paragraph (4) of the memorandum, we find the words "substantially in the manner presently represented to you." Although this particular clause may not necessarily be material to the present dispute, it shows the

existence of representations outside of the face of the agreement, and demonstrates the fact that the memorandum standing alone is incomplete.

In similar situations the California authorities have uniformly admitted extrinsic evidence to resolve an ambiguity created where a document refers to another agreement or to a word not defined within the instrument itself, and amply support our contention that plaintiff should not be strictly confined to the forty-three lines of the letter memorandum.

In *Wachs v. Wachs* (1938), 11 Cal. 2d 322, 79 P. 2d 1085, a contract referred to "transactions" consummated as to any persons on a certain schedule. The trial court excluded evidence as to what the parties meant by reference to the word "transactions," but the District Court of Appeal reversed the judgment of the trial court on this and other grounds. The Supreme Court adopted as its own opinion that of the District Court which stated in part:

> "'. . . It cannot be said from a reading of the contract whether the word "transaction" was intended to convey the first or second meaning above suggested. It is one of those contracts where the words "consistently admit of two interpretations, according to the subject matter in contemplation of the parties" and in which "parol evidence might be admitted to show the circumstances under which the contract was made and the subject matter to which the parties referred." (Citations omitted.) The trial court should therefore

have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument.' "

Wachs v. Wachs (1938), 11 Cal. 2d 322, 326, 79 P. 2d 1085.

The District Court of Appeal set forth the considerations impelling such a rule in the case of *Body-Steffner Co. v. Flotill Products* (1944), 63 Cal. App. 2d 555, 147 P. 2d 84. In that case the words "as agents" and "brokerage 5%" appeared in different places in several contracts. The trial court excluded extrinsic evidence. The District Court of Appeal held the contracts to be ambiguous on their face and reversed the judgment of the trial court, saying:

". . . It may be conceded that if a court was compelled to construe the contracts here involved on their face and without the aid of extrinsic evidence they would be construed as contracts of sale, despite the typewritten words more appropriate to the relation of principal and agent. * * *

". . . *where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.* 'The true interpretation of every instrument being manifestly that which will make the

instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that *when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself.'"* (Emphasis added.)

Body-Steffner Co. v. Flotill Products (1944), 63 Cal. App. 2d 555, 561-562, 147 P. 2d 84.

Among numerous other cases announcing the same rule are:

Universal Sales Corp. v. California Press Mfg. Co. (1942), 20 Cal. 2d 751, 128 P. 2d 665;

Woodbine v. Van Horn (1946), 29 Cal. 2d 95, 104, 173 P. 2d 17;

California Canning Peach Growers v. Williams (1938), 11 Cal. 2d 221, 229, 78 P. 2d 1154;

Kohl v. Lytle Creek Water and Improvement Co. (1938), 24 Cal. App. 2d 353, 75 P. 2d 71;

Crawford v. France (1933), 219 Cal. 439, 444, 27 P. 2d 645.

Thus, in the last case just above cited (*Crawford v. France* (1933), 219 Cal. 439, 27 P. 2d 645), the Supreme Court of the State permitted extrinsic evidence as to the understanding of the parties where the contract referred to

a building "suitable for the needs of the owner." In that case, the court said:

> "In addition it is to be noted that there exists an uncertainty upon the face of the contract. In paragraph (1) it is provided that 'the Architect is to design a hotel building suitable for the needs of the Owner' . . . This is such an uncertainty as may be cleared up by parol evidence as to the nature and character of the building which, within the contemplation and understanding of the parties at the time of the execution of the written contract, would be 'suitable for the needs of the Owner'."
>
> *Crawford v. France* (1933), 219 Cal. 439, 444, 27 P. 2d 645.

Based upon the foregoing authorities, we respectfully submit that the order granting the motion to dismiss and the judgment of dismissal entered thereon were erroneous, because the allegations of the agreements between the parties which were extrinsic to the memorandum of June 22, 1948, but were referred to in that memorandum, should have been considered by the court. Likewise, we think it is clear that the ambiguities appearing on the face of the memorandum should be clarified by reference to the surrounding circumstances and concurrent oral agreements, as well as to the subsequent conduct of the contracting parties, prior to the time when defendant Bulova injected itself into the situation.

II.

The Letter Memorandum Contained an Implied Obligation on the Part of Producer Defendants to Use Plaintiff's Name if, as Was the Case, Plaintiff's Sign and Display Was Used in the Motion Picture and Also an Implied Covenant of Good Faith With Respect to the Use of Such Sign and Display.

It is well established that the courts will enforce essential covenants in an agreement which have been assumed by the parties to exist but which have not been expressly set forth. Some of the authorities to this effect are hereinafter discussed.

Although plaintiff believes that the letter memorandum by no means forecloses allegation and proof of the additional portions of the entire transaction between the parties, it is plaintiff's contention that even without reference to the express agreements extrinsic to the memorandum, there exists in the memorandum itself a necessarily implied obligation on the part of producer defendants (1) to use plaintiff's name if plaintiff's sign and display was itself used (as was the case) and (2) to use good faith in connection with its use of plaintiff's sign and display. This latter obligation imposed upon the producer defendants the duty, first, to use its best efforts to include plaintiff's sign and display in the picture with plaintiff's name appearing thereon, and second, to avoid the use of plaintiff's sign and display in the monstrous manner in which it ultimately utilized it in this case, to wit, with the name of one of plaintiff's competitors affixed thereto.

Paragraph (4) of the memorandum provides with respect to all the advertisers represented by Kline that producer defendants "will bear the cost . . . of . . . displays which are not actually included in the picture"

[R. 21] while Paragraph (3) provides that "the cost of constructing such . . . displays . . . will be borne by . . . [the advertisers] provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public" [R. 21]. Plaintiff believes that these paragraphs cannot be read without reaching the conclusion that the parties clearly implied that if the contemplated displays were *used* the name of the advertiser furnishing the display would appear in connection therewith.

In this respect the classic language of Judge Cardozo in a similar situation in *Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N. Y. 88, 118 N. E. 214, seems appropriate.

> "It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. *A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed* (citations omitted). *If that is so, there is a contract.*" (Emphasis added.)
>
> *Wood v. Lucy, Lady Duff-Gordon* (1917), 222 N. Y. 88, 118 N. E. 214.

Certainly the letter memorandum in question is instinct with an obligation barring defendants Cowan from doing what they did here, to wit: to use the plaintiff's display, but to insert on the film the name of one of plaintiff's principal competitors.

It is important to note that the letter memorandum itself does not anywhere contain any statement that the advertisers will construct any displays or will permit the use of them if constructed. Yet no one could seriously contend that there is not an implicit covenant so binding the advertisers. Unless there is similarly a co-existing implied obligation on the part of defendant producers to use the advertiser's name if the advertiser's display is used, to make good faith efforts to use the advertiser's display, and not to use the advertiser's display for the benefit of a competitor, the letter memorandum was no agreement at all for it would bind no one to do anything and would constitute only a vague statement of intention that the listed advertisers might build displays which defendants Cowan could use as and if they pleased.

This is one of the situations in which the courts have traditionally been willing to imply obligations not expressly set forth. Thus it has been said:

> "This principle is often invoked where questions of mutuality are concerned. If the consideration relied upon for one executory promise is another, such other must itself be binding to constitute a legal obligation and a valuable consideration. *Although the promise relied upon as a consideration may not be expressly stated in any clause of the contract, still if it appears from the entire contract that such promise is intended, it will be as binding and as much a valuable consideration as though it were expressly stated.* Thus a promise to pay for realty agreed to be conveyed, or to permit the use of certain realty in consideration of the lease of other realty, may be implied from the entire contract. So a clause 'machines to be returned by B

to A at the termination of the contract on her repayment of their original cost,' binds A to accept such machines and to repay their original cost." (Emphasis added.)

Page, *Contracts* (2nd Ed. 1920), Vol. 4, §2042, p. 3531.

The California courts have in similar situations recognized the necessity of implying terms where essential to carry out the intention of the parties.

Thus, in *Brawley v. Crosby Research Foundation, Inc.* (1946), 73 Cal. App. 2d 103, 112, 166 P. 2d 392, in which defendant contended that an exclusive licensing contract was invalid because it did not contain any promise by defendant to exploit the pump in question, the court said:

"In this, as in every contract, *there is the implied covenant of good faith and fair dealing;* that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement. (Citations omitted.) *The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question.*"

Brawley v. Crosby Research Foundation, Inc. (1946), 73 Cal. App. 2d 103, 112, 166 P. 2d 392.

To the same effect:

Universal Sales Corp. v. California Press Mfg. Co. (1942), 20 Cal. 2d 751, 771, 128 P. 2d 665.

So also in *Norfolk & N. B. Hosiery Co. v. Arnold* (*Court of Errors and Appeals,* N. J. 1900), 45 Atl. 608.

That was an action on written contract under which plaintiff was granted by defendant the exclusive use of certain patents for a specific period. It appeared that in accordance with the contract plaintiff had advanced purchase money for 105 sewing machines which defendant had then furnished to plaintiff. At the termination of the contract plaintiff offered to return the machines to the defendant, demanding the return of the cost price thereof. Defendant refused to accept the machines on the ground that the language of the contract gave her an option either to accept or to reject the machines at the end of the agreement period. Plaintiff appealed from a judgment for defendant on demurrer.

In reversing the judgment of dismissal, the court said:

> "The language used is 'that at the termination of the contract the machines were to be returned to her on her repayment of their original cost to the plaintiff.' This imposed a mutual obligation on the one party to return, and on the other to accept and pay for, them."

Norfolk & N. B. Hosiery Co. v. Arnold (Ct. of Err. & App. N. J. 1900), 45 Atl. 608, 609.

In relying on the language itself and also on a clearly expressed option elsewhere in the contract, the court held:

> "It cannot, therefore, be reasonably conceived that Mrs. Arnold desired to reserve in this contract the option to take back machines, after they had been used 16 years, by paying the full amount that it cost to

produce them. That clause was inserted manifestly for the benefit of the plaintiff . . ."

Norfolk & N. B. Hosiery Co. v. Arnold (Ct. of Err. & App. N. J. 1900), 45 Atl. 608, 609.

In *Clayton & Waller, Ltd. v. Oliver* (1930), A. C. 209, the English courts in a decision affirmed by the House of Lords, awarded damages for loss of publicity as well as loss of salary where the defendant producers breached their contract employing the plaintiff actor to play one of three leading roles in a musical comedy. This element of damages for loss of publicity was based upon the existence of an implied obligation on the part of defendants to provide the plaintiff with an opportunity to act. The express terms of the contract covered only salary, prohibitions against the plaintiff acting elsewhere and extensions.

See also:

Marbe v. Edwards, Ltd. (1928), 1 K. B. 269.

In the last analysis, the existence and extent of any implied obligation must depend upon the particular instrument and transaction in question. Plaintiff will, therefore, refer to only one more analogous type of case wherein a fundamental obligation has been implied, namely, where a requirements contract imposes an obligation on the seller to supply all of the buyer's requirements without expressly imposing a reciprocal duty on the buyer to purchase all of his requirements from the seller.

Thus, in *Mills-Morris Co. v. Champion Spark Plug Co.* (C. C. A. 6, 1925), 7 F. 2d 38, there was an agreement

between the parties by which the plaintiff became a distributor of spark plugs manufactured by the defendant. The agreement specified the price and terms upon which the spark plugs were to be sold but did not obligate the plaintiff to purchase any plugs from the defendant. In this action the plaintiff was attempting to enforce the obligation of defendant to supply its requirements and the defendant contended that the contract was void for lack of mutuality. The court answered this contention as follows:

> "Nor is the agreement lacking in mutuality because imposing no obligation to buy. Plaintiff had an established trade, and there was implied in the language referred to an obligation to buy from defendant all the plugs that plaintiff should actually, in good faith, and in the normal course of its business, require in supplying its trade. This was sufficiently definite in quantity to be binding."
>
> *Mills-Morris Co. v. Champion Spark Plug Co.* (C. C. A. 6, 1925), 7 F. 2d 38, 39.

The producer's obligation to make good faith efforts to use the plaintiff's display and name, in return for plaintiff's development and construction of the display and authority to use its name, arises not only as an "instinct obligation" but also from the general principles of estoppel further discussed under Point III, *infra*. In this connection plaintiff cannot believe that in equity and in good conscience, the defendant producer should be permitted to deny that

he is bound to retain the plaintiff's name on its display after:

(1) requesting an agreement from an advertiser (whose business is not the building of motion picture sets) for the construction of and permission to use an unusual advertising display of such a nature as to intrigue the motion picture public, and

(2) leading the advertiser to believe that in return for its efforts it was to receive publicity if the display was useable in the picture, and

(3) inducing and requesting the release by the advertisers of publicity which was valuable to the producer.

Plaintiff submits that, regardless of lack of express provision to the contrary, a producer should not be permitted to lead a party to exert its best efforts to produce a satisfactory display, to release advertising including national magazine photographs, and then suddenly to demand in conspiracy with that party's major competitor an additional amount of money in return for proceeding further.

Anyone reading the Complaint must inexorably conclude that the ultimate result achieved by the defendants in this action is contrary to the manifest intent and understanding which plaintiff and the producer defendants must have had when they made their agreement with respect to the use of plaintiff's sign and display in the motion picture in question. The consideration to be "paid" by producer

defendants to plaintiff in the event plaintiff's sign and display was used, was to be the advertising value which plaintiff would receive. In case of such use, *no monetary consideration* was to move from the producers to plaintiff. If, on the other hand, plaintiff's sign and display was *not* included in the picture, producers agreed to pay to plaintiff the bare cost of constructing the sign. This latter provision was not for the benefit of the producers, but was for the benefit of plaintiff in that it would guarantee to plaintiff a portion of the expenditures which it put into the sign (it would not, for example, reimburse plaintiff for the time, thought and effort expended in the conception of the sign) in the event its sign and display was not used.

Nevertheless, in the present case the producer defendants (induced, aided and abetted by the defendant Bulova) after having actually included plaintiff's sign and display in the picture (by virtue of which plaintiff immediately became entitled to the consideration agreed upon, to wit: the *advertising value* of having its sign and display in the picture), nevertheless thereafter deleted plaintiff's name from the picture (in all other respects plaintiff's sign and display remained in the picture) and merely tendered to plaintiff the monetary consideration (the bare cost of the sign) which plaintiff had agreed to accept in the event the sign and display had not been used and actually included.

We submit that no such result was ever contemplated or intended by the parties, and indeed such result is directly contrary to the intention of the parties as disclosed by the memorandum, even if, for purposes of argument, we were to disregard entirely all matters extrinsic to the letter memorandum.

III.

By Virtue of Their Conduct During the Nine-Month Period Subsequent to the Execution of the Letter Memorandum, Producer Defendants Became Obligated to Use Plaintiff's Name on Its Sign and Display in the Motion Picture.

If we were to assume, solely for purposes of argument, that neither Point I nor Point II, *supra,* is well taken, that parol evidence with respect to the agreement is not admissible, that plaintiff is to be confined strictly to the letter memorandum of June 22, 1948, that the memorandum gave a right of election to the producer defendants, and that the memorandum otherwise on its face would permit the use of plaintiff's display without plaintiff's name (all of which we deny), *nevertheless* we submit that the events occurring subsequent to the execution of that memorandum were such as to bind the producer defendants to use plaintiff's name on its sign and display. This on the theory that the producers (defendants Cowan) either (1) made a binding election to so use the sign and display, or (2) are estopped to deny that they made such an election, or both.

(1) Producer Defendants Made a Binding Election to Use Plaintiff's Sign and Display.

The trial court apparently concluded that the allegations of election and estoppel were insufficient to state a claim, for in its decision it said:

> "Cowan had complete freedom of action, as between the two methods of benefiting from the contract, up to and including the actual incorporation and use of the set-up in the 'final version' of the picture." Decisions on Motions dated February 27, 1950. [R. 48.]

We submit that in so ruling, the trial court completely overlooked the distinction between (1) an *election* as to which obligation will be performed and (2) the *performance* of the obligation which is elected. In other words, an irrevocable election *can* be made prior to the time of performance of the alternative in spite of the fact that the election might have been postponed until the time of performance.

Indisputable evidence of this distinction has been presented by the producers themselves, in that by their letter of April 20, 1949 [Compl. Par. XV; R. 13] those defendants advised plaintiff that they elected not to use the Gruen name, despite the fact that the picture had not then been released and was not released for some time thereafter. If defendants by such a mere letter could make an election, it seems self-evident that their earlier conduct and letters may be looked to as evidencing a contrary election and should be looked at by the ultimate trier of facts in determining whether a prior election had taken place. But the trial court held to the contrary.

The attempt by producer defendants to relieve themselves of the effects of their earlier election to utilize plaintiff's special sign and display by the mere device of advising plaintiff at a later date that they were eliminating plaintiff's name from the picture, is not unique. Others have endeavored (without success) in similar cases to reverse and withdraw from a position previously taken by them.

Thus in *Hankey v. Employer's Casualty Co.* (1943), Tex. Civ. App., 176 S. W. 2d 357, defendant insured plaintiff's automobile against theft. In case of loss due

to theft and in the event of the recovery of the automobile, the defendant had the right to choose whether to return to the plaintiff the automobile plus the decrease in value caused by the theft, or to return to the plaintiff the value of the automobile at the time of the theft. After the automobile was stolen the defendant notified the plaintiff that it elected to return the automobile plus the decrease in the value thereof, but up to the time of the filing of the complaint defendant had refused to return the automobile to the plaintiff.

On appeal it was held that the defendant had elected which performance it would render under the policy and hence had precluded itself from becoming the owner of the automobile. Therefore, its refusal to return the automobile to plaintiff amounted to a conversion and subjected the defendant to liability for exemplary damages. On motion for rehearing, the defendant took the same position as was adopted by the trial court in the instant case, asserting:

> " 'The company could not exercise its option to return the car to the plaintiff, without doing so. If it failed to return the car to the plaintiff, then it had not exercised its option to return it to him, but had exercised its option to keep the car . . .' "
>
> *Hankey v. Employer's Casualty Co.* (1943), Tex. Civ. App., 176 S. W. 2d 357, 362.

Defendant's argument was rejected by the court in following language:

> "The insurance company is in error in its view that the option, . . . could only be accepted by returning it . . . *the insurance company by electing not to take the title to the automobile but to re-*

turn it to plaintiff, and communicating such election to plaintiff fixed the right of plaintiff to the title and ownership of said automobile . . ." (Emphasis added.)

Hankey v. Employer's Casualty Co. (1943), Tex. Civ. App., 176 S. W. 2d 357, 362.

The same result was arrived at in *Crane-Rankin Development Co. v. Duke* (1939), 185 Okla. 223, 90 P. 2d 883. Therein the plaintiff had granted the defendant corporation an option to purchase his interest in an oil well. The secretary of the defendant orally informed the plaintiff that the defendant had elected to exercise its option to purchase. Thereafter the defendant refused to complete the purchase and the plaintiff sued for breach of contract.

In upholding judgment for the plaintiff, the court made the following statement:

"*We believe the company is confusing performance with acceptance.* We agree with the company's assertion that the option contract was unilateral, and imposed no obligation upon the company until it elected to exercise its right to avail itself of the offer held out to it. When it did so elect it thereby simply accepted the offer made by the other party, and, *when it did accept, the terms specified in the option became obligations . . .*" (Emphasis added.)

Crane-Rankin Development Co. v. Duke (1939), 185 Okla. 223, 90 P. 2d 883, 884.

We do not think it is particularly important whether the matter be labeled an option, a choice, or an election. Thus, *although the court in the Hankey case spoke in terms of an option, the defendant really had alternative obligations,* either to return the car and the decrease in value thereof or to pay the value of the car at the time of the theft. In the case at bar the alternatives (according to the trial court's theory) were either to include the plaintiff's sign and display or to exclude it and bear the cost thereof. Hence, even on the trial court's theory, the cases are analogous, for in each there is or may be a *distinction* between the election and the performance under the election, and accordingly that election may be evidenced by something other than performance. Yet the trial court refused to acknowledge this possibility.

Some of the significant alleged declarations and acts indicating defendants' election are: The actual use of the sign in the production of the motion picture prior to the end of August, 1948, and the prompt return to plaintiff of the sign and display *without then tendering its cost* [Compl. Par. VII; R. 7-8]; the expression by producer defendants of their desire to publicize their motion picture in Life Magazine and the release of photographs of plaintiff's sign and display [Compl. Par. VIII; R. 8-9]; the letter of producer defendants to plaintiff under date of September 10, 1948, enclosing "photographs of the action of the Gruen Watch sign in the current Lester Cowan production" and advising plaintiff that "The sign gets a tremendous play in the picture and you will note that

Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film" [Compl. Par. IX; R. 9, 22-23]; the second letter of producer defendants to plaintiff under date of October 4, 1948, sending more "photographs of Harpo Marx swinging on the pendulum of the Gruen Watch sign," and stating the "first release date on the picture will be Lincoln's Birthday with the premiere in Cincinnati" [Compl. Par. X, R. 9-10, 23-24]; and finally, the actual publication in Life Magazine of action photographs showing plaintiff's sign and display, accompanied by an article in said Magazine which refers to "the Marx Brothers' forthcoming movie 'Love Happy,'" this on February 7, 1949, just five days prior to the date (Lincoln's Birthday) which producer defendants had set for the premiere [Compl. Par. XI; R. 10-11, 25-29].

Frankly, we have found it difficult to conceive of any acts or course of conduct which could more clearly evidence an election than those of the producer defendants in this case. As we have previously noted, the producers by their act of sending plaintiff their letter of April 20, 1949, not only recognized but affirmatively asserted that their claimed choice or option or right of election (whatever they may choose to call it), *could be exercised prior to the date of the release of the motion picture.* Having acknowledged that *principle,* we submit they are now in no position (and certainly not on a motion to dismiss which admits the truth of the allegations of the complaint) to contend as a matter of law that their course of con-

duct disclosed by the complaint could not on a trial on the merits be found by a court or jury to constitute an election to use plaintiff's sign and display in their motion picture.

(2) The Producer Defendants Are Estopped by Their Conduct and Plaintiff's Reliance Thereon From Denying That They Had Elected to Use Plaintiff's Sign and Display.

We are equally satisfied that the Complaint clearly sets forth all of the elements necessary to raise an estoppel against the producers' claim that they made no election until their letter of April 20, 1949.

The principle by which an estoppel or quasi-estoppel is raised against the producer defendants is well stated in 10 Cal. Jur., p. 646, Estoppel, Sec. 26:

> ". . . one to whom two inconsistent courses are open and who elects to pursue one of them is afterwards precluded from pursuing the other."
>
> 10 Cal. Jur. 646.

The Complaint herein expressly alleged that after having (1) actually used and included plaintiff's sign and display in the motion picture and (2) having returned it to plaintiff *without* tendering the cost thereof, the producer defendants *thereafter* (3) authorized the Life Magazine publicity, (4) furnished plaintiff with photographs of the action of its sign in the motion picture, (5) advised plaintiff of the release date of the motion

picture, and (6) permitted plaintiff to release publicity on the picture and Gruen's connection therewith to both the jewelers' trade papers and to plaintiff's dealers throughout the United States. The Complaint further alleges that this publicity was of value to the producer defendants and that plaintiff would not have permitted or taken such steps except in reliance upon the agreements, representations and actions of said defendants and plaintiff's belief that said defendants had finally determined to use its said sign and display [Compl. Par. X; R. 9-10].

In other words, having induced plaintiff to take steps which were certainly *not* called for by the letter memorandum of June 22, 1948, which steps are alleged to have been of value to the producer defendants and which steps plaintiff alleged it took *solely* in reliance upon its belief (induced by the producer defendants as aforesaid) that a final determination *had* been made, said defendants should not now be heard to assert that such determination had in fact not been made.

All of the elements of an estoppel or quasi-estoppel have been specifically alleged in the Complaint, and we respectfully submit that it does not lie in the mouth of the producer defendants on a motion to dismiss to argue that they are not estopped.

IV.

Defendants Had No Right to Use Plaintiff's Sign and the Idea Embodied Therein Except for the Purpose for Which Plaintiff Caused It to Be Conceived and Constructed and for Which It Was Bailed to Defendants Cowan.

It was expressly alleged in Paragraphs II and VII of the Complaint [R. 4-5, 7] that plaintiff *conceived the idea* for the sequence or stunt, and nothing in the Complaint indicates that plaintiff has ever consented to the use of this original idea by defendants *except* on the condition that plaintiff's name be a part thereof as originally photographed. Quite to the contrary, it was alleged that:

> "At no time did plaintiff authorize defendants Cowan to use or utilize plaintiff's said special sign and display except for the purpose of advertising plaintiff's products through the medium of said motion picture; nor did plaintiff ever authorize defendants Cowan to permit any competitor of plaintiff to use or utilize or obtain any benefit from the use of plaintiff's said special sign and display." [Compl. Par. VII; R. 8.]

It seems to us to be evident from the record that plaintiff's object in honoring the producers' original request and entering into the transaction of June, 1948, was to obtain for itself the valuable world-wide advertising which would necessarily follow from the inclusion of its novel sign and display in the Marx Brothers' motion picture. But by virtue of the acts of defendants, plaintiff's novel idea, sign and display has been included in the picture while its entire advertising value has been diverted to the defendants Cowan and Bulova.

Despite the foregoing the trial court apparently concluded that the producer defendants had an option to use the sign in their motion picture or not to use the sign and pay its cost, and from this premise reached the *non sequitur* that:

> "The only penalty for not using the display is liability for price. . . . Cowan was free to do what he pleased with the property if he paid for it." [R. 47.]

In other words, the trial court ruled that after having used the sign in the picture, the defendants could tender the mere cost of construction and then be absolutely free to use the sign and display as well as the ideas embodied therein without any further authority from or compensation to the plaintiff; all this despite the fact that the only condition under which producer defendants were authorized to pay off by means of such monetary consideration, was in the event of *non-user*.

We respectfully submit that the court's analysis was clearly incorrect as well as being in direct conflict with California Civil Code, Section 1450:

> "*Alternatives indivisible.* The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party."
>
> California Civil Code, Sec. 1450.

In other words, even if we were to assume that the producer defendants had the absolute right of election (which we deny) between user and non-user, still this

would not authorize or validate their present conduct of following one course (user) but tendering the consideration called for by the other (non-user). Nor would it authorize them to fail to elect *either* of the alternatives which they claim were open to them, but instead follow the course which they took in the present case.

We believe that a proper analysis of the letter memorandum makes it clear that plaintiff merely bailed its specially constructed display sign (and the idea embodied therein) to the producer defendants for the special purposes of the agreement. It was bailed for the purpose of being used in the motion picture (and it was so used!) in consideration of world-wide advertising accruing to plaintiff from the showing of the picture. Hence, even apart from plaintiff's literary property rights which likewise have been used without authority by the defendants in this action, plaintiff has the additional and separate right to prohibit the defendants from exploiting or retaining the fruits of their use of plaintiff's sign and display for a purpose which was never authorized by plaintiff.

The producer defendants have appropriated plaintiff's idea in two ways: (1) by appropriating to their own use the entertainment or stunt value of plaintiff's idea and display and (2) by selling the advertising value of the idea and display to defendants Bulova. Defendant Bulova in turn has induced the producer defendants to display Bulova's name in place of plaintiff's with full knowledge of plaintiff's rights, thus diverting to defendant Bulova

the advertising value which otherwise would have redounded to plaintiff's benefit.

The language of the court in *National Telephone Directory Co. v. Dawson Manufacturing Company & Chase Hotel Company* (1924), 214 Mo. App. 691, 263 S. W. 483, is peculiarly appropriate to the instant case. The court, in holding that injunctive relief was properly granted, said:

> ". . . in the present case the telephone company merely bailed its directories to the Chase Hotel Company for the specific purpose of being used by it in availing itself of the telephone service for which it had subscribed.
>
> "If the defendants' scheme, as disclosed by the petition in the instant case, does not come within the narrow and technical formula of the doctrine of unfair competition, there can be no question that it comes within the broader reach of the doctrine as defined and applied by the courts in the more recent decisions. The petition discloses that the defendants purpose to pass off their own advertising medium as the advertising medium of the plaintiff, not merely by simulating the plaintiff's medium, *but by actually tacking their own medium upon that of the plaintiff.* By this unfair means the defendants purpose to place their advertising business in competition with that of the plaintiff. A more flagrant case of unfair competition is nowhere disclosed by the books. *In fact, the scheme is more than unfair competition; it amounts to an actual appropriation of the plaintiff's*

property by the defendants to their own business purposes. A court of equity ought not to hesitate long to interpose its protection against a scheme of this character." (Emphasis added.)

National Telephone Directory Co. v. Dawson, etc., Co. (1924), 214 Mo. App. 691, 263 S. W. 483, 485.

There is no longer any doubt that the courts can and will prevent the appropriation of ideas which have been embodied in concrete form, including advertising ideas. Such protection was extended in the case of *Liggett & Meyer Tobacco Co. v. Meyer* (1935), 101 Ind. App. 420, 194 N. E. 206. That was an action to recover the reasonable value of a certain advertisement submitted by plaintiff to defendant in a letter which, among other things, stated that plaintiff trusted that his idea would be of sufficient value to merit a reasonable charge therefor. The idea, as described in the letter, consisted of:

". . . Two gentlemen, well groomed, in working clothes or in hunting togs apparently engaged in conversation, one extending to the other a package of cigarettes saying, 'Have one of these,' the other replying, 'No, thanks; I smoke Chesterfields.'"

Liggett & Meyer Tobacco Co. v. Meyer (1935), 101 Ind. App. 420, 194 N. E. 206, 207.

Judgment was for plaintiff and defendant appealed urging as error the overruling of defendant's demurrers and the giving of certain instructions. In affirming the judgment

of the lower court the Appellate Court, sitting *in banc,* said:

> ". . . The rules of the common law are continually changing and expanding with the progress of the society in which it prevails. It does not lag behind, but adapts itself to the conditions of the present so that the ends of justice may be reached. *While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale.* Of course, it must be something novel and new; in other words, one cannot claim any right in the multiplication table." (Emphasis added.)
>
> *Liggett & Meyer Tobacco Co. v. Meyer* (1935), 101 Ind. App. 420, 194 N. E. 206, 210.

Among other things the court approved a certain instruction:

> "'. . . The court instructs the jury that *one who knowingly receives, retains and uses, or otherwise deals with as his own, property or goods sent him by another, under such circumstances as indicate a sale thereof is intended, cannot escape liability to pay therefor, even though not expressly ordered or contracted for, by advising the sender that he does not want such property or goods, if in fact such person retains and uses, or otherwise deals with such goods or property as his own.'" (Emphasis added.)
>
> *Liggett & Meyer Tobacco Co. v. Meyer* (1935), 101 Ind. App. 420, 194 N. E. 206, 211.

The instant case does not even involve a sale but merely an agreement whereby defendants Cowan were authorized to use plaintiff's special sign and display embodying their unique idea, for a certain limited and specified purpose, and in consideration of the advertising benefits resulting if used. Clearly the defendants in this case have gone far beyond the authorized purpose and have deprived plaintiff of the consideration plaintiff was led to expect.

In the *Liggett & Meyer* case, *supra,* the compensation requested by the plaintiff in his letter was a reasonable charge for his idea and this was granted by the court. In the case at bar the compensation agreed to be "paid" to plaintiff if its sign was used was the advertising value which plaintiff would derive from the display of its name on the clock in the picture. Not only is there nothing in the Complaint to indicate that plaintiff ever consented to use of its idea under any other condition or for any other purpose, but as previously noted, the affirmative allegations in the Complaint are directly to the contrary [Compl. Par. VII; R. 7-8].

Actually the defendants Cowan are attempting precisely the subterfuge which was denounced by the court in the *Liggett & Meyer* case, *supra,* that is, while they advised plaintiff by their letter of April 20, 1949 [Compl. Par. XV; R. 13], that they would not use plaintiff's name they are in fact using plaintiff's idea, sign and display in the picture and have sold the advertising benefits thereof to defendants Bulova.

V.

Defendant Bulova Is Also Liable to Plaintiff for Inducing Breach of Contract, or Even if Plaintiff Had Only a Contract Terminable at Will, for Wrongfully Inducing Termination, and for Interference With Plaintiff's Advantageous Business Relationship.

In addition to its liability to plaintiff for having wrongfully appropriated plaintiff's property rights, including its unique idea (Point IV, *supra*), defendant Bulova is likewise liable to plaintiff upon one or both of the two additional grounds discussed under the following two subheadings.

(1) If a Breach of Contract Claim Is Stated Against the Producer Defendants, Defendant Bulova Is Liable for Wilfully Inducing Such Breach.

The decision of the trial court dismissing the Complaint recognized that if there was a contractual obligation on the part of producer defendants to include plaintiff's name on its sign and display in the motion picture, then the Complaint stated a claim against defendants Bulova for inducing breach of contract [R. 48]. Hence, it seems unnecessary to cite authorities in support of plaintiff's claim against defendants Bulova based upon their having wilfully induced a breach of contract.

(2) Even if Plaintiff's Contract With Producer Defendants Were Held to Be Merely a Contract Terminable at the Will of Producer Defendants a Claim Is Nevertheless Stated Against Defendant Bulova for Unjustifiably Inducing the Termination Thereof.

Even if plaintiff's agreement with the producer defendants were held to be only a contract terminable at the will of the producer, nevertheless a claim is stated against defendant Bulova for intentionally and unjustifiably inducing the termination of the contract. The Complaint specifically alleges that in the absence of the malicious inducement of defendant Bulova, the producers would not have erased the name Gruen from the motion picture [Compl. XVII, R. 15; Compl. XIV, R. 13; and Compl. XXI, R. 17].

The California courts have recognized the principle that such an intentional and unjustifiable interference with contractual relations is an actionable wrong, even if the relations are at the will of the parties.

Thus, in *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 172 P. 2d 867, the Supreme Court of California, after pointing out that the contract, as set forth in the plaintiff's complaint, was terminable at will, said:

> "Intentional and unjustifiable interference with contractual relations is actionable in California as in most other jurisdictions. (*Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33 [112 P. 2d 631]; see cases collected in 84 A. L. R. 43.) *Recognizing that the fact that a contract is 'at the will of the parties, respectively does not make it one at the will of others,'* (*Truax*

> *v. Raich,* 239 U. S. 33, 38 [36 S. Ct. 7, 60 L. Ed. 131, Ann. Cas. 1917B 283, L. R. A. 1916D 545]) *the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable."* (Emphasis added.)
>
> *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 39-40, 172 P. 2d 867.

In another recent decision, *Ramona v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670, 186 P. 2d 1012, the District Court of Appeal similarly stated:

> "It is immaterial whether after the dissolution of plaintiff's partnership his contract with Pesquera was one 'at will.' *Speegle v. Board of Fire Underwriters, supra,* says (p. 39) that 'at the will of the parties, respectively does not make it one at the will of others,' and that 'the great majority of the cases have held that unjustifiable interference with contracts terminable at will is actionable.' "
>
> *Ramona v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670, 673, 186 P. 2d 1012.

In addition it appears to be well recognized that a cause of action exists against one who interferes with an advantageous business relation, whether or not such a relation is established by contract. This principle is established in California as well as being frequently applied and recognized elsewhere.

Thus, in *Buxbom v. Smith* (1944), 23 Cal. 2d 535, 145 P. 2d 305, plaintiff, a publisher and distributor of leaflets and advertising newspapers, negotiated contracts with defendant advertiser. The defendant broke the two contracts a few days later and proceeded to hire plaintiff's distributing crews and supervisor. It does not appear

that there was a contractual relationship between the plaintiff and his employees. In sustaining judgment for $4,000.00 damages in tort, the court stated as follows:

> "This immunity against liability is not retained, however, if unfair methods are used in interfering in such advantageous relations. (Prosser, Torts, p. 1023 *et seq.,* and cases cited.) In this particular case there are special circumstances which bring it outside the ordinary course of competition. Here the record shows that the defendants gained an unfair advantage over the plaintiff through deceptive dealings in the form of a contractual arrangement whereby they deliberately induced the plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then noncompeting business—a chain of public markets—for circulation of a 'shopping news,' and then, having acquired through their employment agreement with the plaintiff, complete knowledge of his business methods and records, they undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise.
>
> * * * * * * * *
>
> ". . . A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above. It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. (See Prosser, Torts, p. 1023 *et seq.;* Rest. Torts, Sec. 768.)"

Buxbom v. Smith (1944), 23 Cal. 2d 535, 547, 548, 145 P. 2d 305.

We, of course, recognize that in many instances interferences with normal business relations have been justified on the theory that normal business competition is bound to result in some such interferences and hence that any damages arising therefrom is not actionable. However, we do not believe that the law permits any and all interferences under the guise of competition, and we think that the circumstances of the present case are such as to "bring it outside the ordinary course of competition," within the language of the California Supreme Court decision just above cited, *Buxbom v. Smith, supra.*

There are two other recent cases from other jurisdictions applying the rule of liability for interference with an advantageous business relation.

In *Newark Hwde. & Plumb. Supp. Co. v. Stove Mfrs. Corp.* (1948), 136 N. J. L. 401, 56 A. 2d 605 [Affd. 137 N. J. L. 612, 61 A. 2d 240 (1948)], plaintiff and defendant were competitive stove dealers doing business on the same street in Newark. During the stove shortage a manufacturer shipped stoves consigned to the plaintiff which were mistakenly delivered to the defendant, who sold them, aware of the consignment to the plaintiff. Suit was filed on the theory that the defendant interfered with plaintiff's legal right to receive the stoves, thereby interfering with his business, committing an actionable tort. Held, the plaintiff's complaint set forth a legally sufficient cause of action.

> "It is said that the respondent herein, to prevail, must establish a breach of some sort of a relationship, possibly contractual, and that since there was no contractual or other relationship existing between appellant and respondent the claim must fall. We

think not. The existence of contractual relationship is not a requisite of the asserted right of action. The essence of the action is the damage done to the respondent flowing from the wrongful act of appellant, Louis Kamm, Inc., v. Flink, *supra. Had the appellant refrained from wrongfully interfering with the transaction, respondent would undoubtedly have realized a profit through the sale of the stoves to retail purchasers. The wrongful interference was, therefore, the proximate cause of respondent's damages."* (Emphasis added.)

Newark Hdwe. & Plumb. Supp. Co. v. Stove Mfrs. Corp. (1948), 136 N. J. L. 401; 56 A. 2d 605, 608.

The second recent case in which liability was found is *Owen v. Williams* (1948), 332 Mass. 356, 77 N. E. 2d 318, 9 A. L. R. 2d 223.

A special nurse brought suit against an influential doctor for inducing a hospital to take her off the list of employable nurses. A jury verdict for the nurse was sustained by Chief Justice Qua.

"The governing principle of law is set forth in Restatement, Torts, §766, in these words, '* * * one who, without a privilege to do so, induces or otherwise purposely causes a third person not to * * * enter into or continue a business relation with another is liable to the other for the harm caused thereby.'"

* * * * * * * *

"And in order to maintain the action it was not necessary that the plaintiff prove that she had a binding contract with the hospital. *It is well settled that an existing or even a probable future business relationship from which there is a reasonable expectancy of financial benefit is enough.*" (Emphasis added.)

Owen v. Williams (1948), 332 Mass. 356, 77 N. E. 2d 318, 320, 321, 322, 9 A. L. R. 2d 223.

It should be noted that in *Newark Hardware and Plumbing Supply Co. v. Stove Manufacturing Corporation, supra,* plaintiff and defendant were competitors, as are plaintiff and defendants Bulova in the case at bar; but this fact did not prevent liability in the cited case, nor should it prevent liability here.

The foregoing cases, while analogous in many respects to the situation existing in the case at bar are primarily cited and discussed to indicate that the trial court was in error in holding that relief may be granted only where there has been a breach of a contractual right. On the contrary we believe that relief may be granted whenever there is an unprivileged interference with an advantageous relationship.

In the case at bar there certainly was *a contract* between plaintiff and producer defendants. It is equally certain that defendant Bulova intermeddled with that contract. Even if the contract be considered as one which was, so to speak, at the will of the producer defendant neverthe-

less the fact remains the producers *would not have taken the course they ultimately did except for the wilful and malicious interference of defendant Bulova.*

The allegations of the Complaint show that during the period from June, 1948, through at least February, 1949, the relations of plaintiff and producer defendants were perfectly satisfactory and plaintiff's sign and display with its name affixed had been used and actually included in the motion picture. It is equally clear and it is specifically so alleged, that no change would have been made in the sign except for the wilful and malicious interference on the part of defendant Bulova. Hence, we respectfully submit that the analogy between the cases just above cited and the case at bar are such as to authorize relief to plaintiff, for even if, as producer defendants claim (and plaintiff denies) the contract was at the will of the producer defendants, it does not mean that it was at the will of defendant Bulova.

The action of defendant Bulova in prevailing upon producer defendants to substitute the Bulova name for the Gruen name on plaintiff's sign and display effectively transferred to defendants Bulova all of the benefits, which, without any further action on the part of anyone except the final release of the picture, would have come to plaintiff. We submit these facts clearly state a claim against defendants Bulova, regardless of whether the obligations of defendants Cowan to plaintiff were contractually binding or not.

VI.

Each of the Stricken Portions of the Complaint Is Material to One or More of the Foregoing Grounds of Recovery for Which Reason the Order Granting the Motion to Strike Was Erroneous.

We believe that each of the portions of the Complaint stricken is necessary to an understanding of the entire course of conduct between the plaintiff and the defendants. It is plaintiff's contention that it was the duty of the trial court to examine this entire course of conduct and hence that the granting of the motion to strike was erroneous in its entirety. However, without intimating that all of the portions stricken should not be considered by the court in considering each of the various theories upon which plaintiff claims a right to relief, in the following paragraphs we shall briefly summarize the particular points of materiality of the various portions stricken.

(1) The allegations which were stricken in granting Specifications A, B, C, D, E, F, G, H, I, J, K and L of the motion to strike [R. 57-64; Appx. 2-9] are material to the grounds of recovery urged under Points I and II of the Argument which rely upon a contractual undertaking to use plaintiff's name on plaintiff's display in the motion picture in question.

(2) The allegations which were stricken in granting Specifications G, H, I, J, K and L of the motion to strike [R. 60-64; Appx. 6-9] are material to the ground of recovery urged under Point III of the Argument which relies upon an election or an estoppel to deny

an election to use plaintiff's name on plaintiff's display in the motion picture in question.

(3) The allegations which were stricken in granting Specifications B, F, P and Q [R. 58, 60 and 66; Appx. 3, 5, 11 and 14] are material to the ground of recovery urged under Point IV of the Argument which relies upon the unauthorized use by defendants of plaintiff's property right in the concretely embodied idea, and the use of the sign in the motion picture for a purpose other than that authorized by plaintiff.

(4) If it is determined that defendants Cowan were under a contractual obligation to plaintiff, the breach of which obligation was induced by defendants Bulova, then it is apparent that all portions of the Complaint establishing the contractual obligation are also necessary in establishing the liability of the defendants Bulova. In addition, however, the allegations which were stricken in granting Specifications M, N, O and P [R. 64-66; Appx. 9-11] are particularly material to plaintiff's claim against defendants Bulova, based upon the inducing of a breach of contract. With respect to plaintiff's claim against defendants Bulova based upon interference with an advantageous business relation, it is again necessary to consider the entire course of conduct of the parties.

(5) There are other portions of the motion to strike, the granting of which seems clearly erroneous in the event that a claim for relief is stated under any of the theories relied upon by plaintiff. These include:

> (a) The allegations with respect to the removal of plaintiff's name and the substitution of the name "Bulova" and the state of mind of producer defendants and defendants Bulova accompanying the re-

moval and substitution, set out in Specifications N, O and S of the motion to strike [R. 65, 66 and 67; Appx. 10 and 14];

(b) The allegation of the loss to plaintiff of the value of the unique stunt and special sign and display conceived by plaintiff, set out in Specification Q of the motion to strike [R. 66; Appx. 14];

(c) The allegation of damage to plaintiff's competitive position, reputation and good will, set out in Specification R of the motion to strike [R. 66; Appx. 14]; and

(d) The allegation that all of the acts of the defendants were willful, malicious and oppressive, entitling the plaintiff to punitive damages, set out in Specification S of the motion to strike [R. 66, 67; Appx. 14].

We submit that upon the authorities cited in the third paragraph of our Argument, the Motion to Strike should have been denied in its entirety.

Conclusion.

The courts have ruled innumerable times that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to any relief under any state of facts which could be proved in support of the claim. No such certainty here appears, but on the contrary, the Complaint clearly discloses that plaintiff is entitled to relief on one or more theories.

For all of which reasons it is submitted that the judgment below and each and every part thereof should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

TAFT, STETTINIUS & HOLLISTER,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
RICHARD E. DAVIS,
Attorneys for Appellant.

APPENDIX.

Second Amended and Supplemental Complaint for Injunction, Damages and Exemplary Damages. [R. 2-24.] (Photostatic exhibit [R. 25-29] omitted.)

(Each portion of the Complaint stricken by the court below is underscored and is preceded in brackets by the capital letter which was used to designate that portion in the motion to strike.)

Comes now the plaintiff, The Gruen Watch Company, an Ohio corporation, and for grounds of complaint against the defendants herein, and each of them, complains and alleges as follows:

I.

Plaintiff is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of Ohio; defendant Artists Alliance, Inc., is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of California; defendant Lester Cowan is and at all times herein mentioned was a citizen of the State of California and is and at all times herein mentioned was doing business in the State of California under the name "Lester Cowan Productions"; the true character or capacity of the defendant Lester Cowan Productions is unknown, but this plaintiff is informed and believes and therefore alleges that said Lester Cowan Productions is and at all times herein mentioned was organized and existing under the laws of the State of California and doing business in the State of California; defendant Bulova Watch Company, Inc., is

and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of New York and is and at all times herein mentioned has been present and doing business in the State of California. Defendants Doe I, Doe II, Doe III, Doe IV, Doe V and Doe VI are designated by fictitious names because their true names and capacities are unknown to plaintiff; plaintiff is informed and believes and therefore alleges that they are and each of them is a citizen of a State other than Ohio and plaintiff will ask leave of Court to substitute the true names and capacities of such defendants by amendment as soon as such true names are discovered. Defendants Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III and Doe IV and each of them will for convenience hereinafter sometimes be referred to as "defendants Cowan." Defendants Bulova Watch Company, Inc., Doe V and Doe VI and each of them will for convenience hereinafter sometimes be referred to as "defendants Bulova." The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

On and for some time prior to May 24, 1948, Walter E. Kline was an agent of plaintiff, acting on behalf of plaintiff, at Los Angeles, California. [A] On or about said date, the defendants Cowan advised the said Kline of the said defendants' plans and intentions to make a feature length motion picture in which the Marx Brothers would be co-starred, and further advised the said Kline that certain scenes and sequences in the motion picture would be devoted to the activities of one or more of the said Marx Brothers in connection with various advertising displays.

On or about the same date said defendants Cowan requested the said Kline to obtain from any noncompeting advertisers represented by him, agreements in connection with the said defendants' use of signs and displays advertising the products of said noncompeting advertisers. Plaintiff was then among the advertisers represented by the said Kline, but the defendants Bulova were not. [B] Plaintiff is informed and believes and therefore alleges that at said time the script of said motion picture did not contain a clock sequence or stunt but that the said Kline prior to the signing of the memorandum of agreement, hereinafter referred to in Paragraph IV, conceived the clock sequence or stunt which was ultimately used by defendants Cowan, and also suggested the idea of a clock of his client Gruen being used in connection therewith.

III.

[C] Thereafter at said special instance and request of said defendants Cowan, the said Kline obtained from plaintiff an agreement for defendants Cowan to use in said motion picture a sign and display advertising plaintiff's products, upon the condition and understanding that the shots of plaintiff's said special sign and display would be used and displayed in said motion picture. Said Kline thereupon advised defendants Cowan of his receipt from plaintiff of said agreement, and said defendants thereupon agreed with plaintiff that in consideration of plaintiff's authority and permission to use plaintiff's said contemplated special sign and display in said motion picture and in consideration of plaintiff's constructing and paying the cost of said sign and display, said defendants would use said sign and display in said motion picture.

IV.

[D] Concurrently with the agreement referred to in Paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants Cowan would bear the cost of said sign and display. At the same time it was understood and agreed between plaintiff and the defendants Cowan that defendants Cowan would bear the cost of said sign and display if said motion picture was not released to the general public prior to January 1, 1950.

V.

Thereafter and between about June 22, 1948, and about July 3, 1948, plaintiff and defendants Cowan executed a memorandum of agreement dated June 22, 1948, which said memorandum was intended to and did embody directly and by reference, the said prior oral agreements of the parties. [E] The "agreement" referred to in Paragraph 2 of said memorandum dated June 22, 1948, was and is the agreement set out in Paragraph III hereof. That portion of paragraph 4 of said memorandum which provided that defendants Cowan would pay plaintiff for the sign or display in the event said sign or display was "not actually included in the picture", was intended to and did express the parties' additional concurrent understanding and agreement set out in Paragraph IV hereof. A copy of said memorandum of agreement dated June 22, 1948, is attached hereto, marked Exhibit "A" and is hereby referred to and made a part hereof as though here set forth at length.

VI.

The Marx Brothers, known as Chico, Harpo and Groucho, are comedians of international renown, and the feature length motion picture "Love Happy" starring them was and is expected to be and in the normal course of events will be seen by many millions of people in the United States and throughout the world, and the rights of the plaintiff acquired under the aforesaid agreements were and are unique and of great value. The Gruen line of watches manufactured by plaintiff is one of the leading brands of watches in the United States and throughout the world, and plaintiff spends annually in advertising its products hundreds of thousands of dollars, and defendants Cowan, by virtue of said agreements, acquired valuable rights from plaintiff, to wit, the right to use palintiff's sign and display, including its nationally advertised name and products, in the said motion picture.

VII.

In compliance with the provisions of the hereinabove mentioned agreements, plaintiff, at its own cost, caused to be constructed and delivered to defendants Cowan a specially designed advertising sign and display consisting of a large sign bearing a neon illuminated clock, swinging pendulum, and the words "Gruen Watch Time". [F] In addition to the actual cost of construction, plaintiff expended a substantial amount of time, thought and effort in the conception and design of said special sign and display, and said special sign and display was actually conceived by, was the original idea of the plaintiff, and was and is the property of the plaintiff. Said plaintiff's special sign and display was, pursuant to said agreements, used by defendants Cowan in the County of Los Angeles, State

of California, in the production of said motion picture starring the Marx Brothers, which picture originally was entitled "Hearts and Diamonds" but which thereafter was and now is entitled "Love Happy". The filming of that portion of said motion picture, which included plaintiff's said sign and display, was completed on or about the end of August, 1948 and the said sign and display of plaintiff, having fully served the purposes of said agreements and of defendants Cowan, was thereupon returned by defendants Cowan to plaintiff's possession in Los Angeles, and said sign and display has been in its possession at all times since. At no time did plaintiff authorize defendants Cowan to use or utilize plaintiff's said special sign and display except for the purpose of advertising plaintiff's products through the medium of said motion picture; nor did plaintiff ever authorize defendants Cowan to permit any competitor of plaintiff to use or utilize or obtain any benefit from the use of plaintiff's said special sign and display.

VIII.

[G] After the defendants Cowan had used plaintiff's said special sign and display in the production of said motion picture, the said defendants Cowan encouraged and permitted Life Magazine, a nationwide weekly publication, and one Slim Aarons, a professional photographer employed by said Life Magazine, to take photographs of said sign and display and provided Aarons and Life Magazine with other photographs of said sign and display which were actually taken from the motion picture film. Concurrently therewith defendants Cowan advised plaintiff of their plan and desire to obtain publicity for their said motion picture from Life Magazine and plaintiff, acting

solely upon the understanding and belief that said defendants had finally determined that plaintiff's display was satisfactory and was in and would remain in said motion picture, authorized and permitted the said defendants to release said photographs for publication. Defendants Cowan thereupon, and with full knowledge of plaintiff's said understanding and belief, released all of said photographs for publication, all for the sole purpose of publicizing and promoting said defendants' motion picture "Love Happy".

IX.

[H] Thereafter and under date of September 10, 1948, defendants Cowan wrote plaintiff a letter and enclosed therewith the photographs referred to therein. A full, true and correct photosatic copy of said letter is attached hereto, marked Exhibit "B," and is hereby referred to and made a part hereof as though here set forth at length.

X.

[I] Thereafter and under date of October 4, 1948, defendants Cowan wrote plaintiff an additional letter and enclosed therewith the additional photographs referred to therein. A full, true and correct photostatic copy of said letter is attached hereto, marked Exhibit "C," and is hereby referred to and made a part hereof as though here set forth at length. [J] In reliance upon the prior agreements, representations and actions of defendants Cowan, plaintiff released said photographs for publication in jewelers' trade papers and said photographs were actually published therein, and likewise in reliance upon said agreements, representations and actions of defendants Cowan, plaintiff ad-

vised its dealers throughout the United States that Gruen would be advertised in said defendants' motion picture. Said release to the jewelers' trade papers and said advice to plaintiff's dealers throughout the United States gave valuable publicity to the said defendants and their motion picture. Plaintiff would not have made said releases to jewelers' trade papers nor given said advice to its dealers except for its understanding and belief theretofore induced by the agreements, representations and actions of defendants Cowan that its special advertising sign and display was and would be in the said motion picture.

XI.

[K] Thereafter, and with the knowledge and permission of defendants Cowan, Life Magazine published in its issue dated February 7, 1949, a four-page article including (9) photographs or shots stated as being from "The Marx Brothers forthcoming motion picture 'Love Happy.'" Said article likewise made certain other statements and representations to the general public, all as is more particularly set forth in said article and in the captions of the said photographs. A copy of the table of contents page, and of said news article and the photographs therein contained, is attached hereto, marked Exhibit "D," and is hereby referred to and made a part hereof as though here set forth at length. Plaintiff is informed and believes and therefore alleges that prior to said publication, the defendants Cowan knew or had good reason to know that they would not use the name Gruen in their said motion picture, but they failed to advise either Life Magazine or the plaintiff of said fact.

XII.

[L] By their acts of authorizing and permitting the release of the said Life Magazine article and the two said photographs which depicted the Gruen name and display, defendants Cowan represented to the public and to plaintiff that said Gruen name and display would be in said forthcoming motion picture, which said defendants Cowan had previously represented to plaintiff (by their letter dated October 4, 1948) would have its world premiere on February 12, 1949, only five days after said Life Magazine publication on February 7, 1949, and by their said acts the said defendants represented to the public and to plaintiff that the photographs reproduced in said Life Magazine article constituted a portion of the final version of the motion picture "Love Happy" and that said photographs would be contained in said motion picture when it was relaesed to the general public.

XIII.

[M] After completion of said motion picture, and after said release of said Life Magazine article and photographs under date of February 7, 1949, and after plaintiff had released said publicity for the said motion picture to jewelers' trade papers and to plaintiff's dealers, defendants Cowan demanded that plaintiff pay them the sum of at least Twenty-Five Thousand Dollars ($25,000.00) cash, allegedly to be used by said defendants for the purpose of jointly advertising said defendants' motion picture and plaintiff's products in national advertising, and defendants Cowan advised plaintiff that unless plaintiff complied with said demand said defendants Cowan would not only remove

from the motion picture any and all shots of the display provided by plaintiff but in addition would substitute in their place shots advertising the product of one of plaintiff's major competitors in the watch industry. [N] Said removal and substitution were threatened, and thereafter carried out, by defendants Cowan arbitrarily, wilfully, maliciously, in bad faith and for the purpose of exacting an additional financial contribution from plaintiff over and above that called for by the agreements of the parties, and for the purpose of injuring the business and good will of plaintiff. [O] Plaintiff refused to comply with said demand. Plaintiff is informed and believes and therefore alleges that while defendants Cowan were making said threats and demands upon plaintiff, they and defendants Bulova were already, but without the knowledge of plaintiff, negotiating to substitute Bulova's name in said motion picture in place of plaintiff's name.

XIV.

Plaintiff is informed and believes and therefore alleges that prior to the commencement of the negotiations referred to in Paragraph XIII hereof, defendants Bulova were aware of the obligations of defendants Cowan to plaintiff and of the facts set forth in Paragraphs II, III, IV, V, VI, VII, VIII and XI hereof, but defendants Bulova nevertheless induced defendants Cowan to disregard their obligations to plaintiff and to enter into and carry out a contract with defendants Bulova, whereby, for a monetary consideration (the precise amount of which is unknown to plaintiff), paid by defendants Bulova to defendants Cowan, the said defendants Cowan would delete the name Gruen from the motion picture "Love

Happy" and would substitute in said motion picture the name Bulova in place of the name Gruen. That said acts of defendants Bulova were all committed with the purpose and intent thereby to deprive plaintiff of the expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will.

XV.

Thereafter, under date of April 20, 1949, defendants Cowan notified plaintiff that they had eliminated and would not use in the motion picture "Love Happy" any reference to plaintiff. Plaintiff has at all times refused to acquiesce in said notification and at all times has insisted that defendants Cowan must retain plaintiff's name and special sign and display in said motion picture and must remove the name Bulova from plaintiff's said special sign and display. Plaintiff notified defendants Bulova of its said position as soon as it learned of the negotiations between defendants Cowan and defendants Bulova, and said notification took place prior to the ultimate world premiere referred to in Paragraph XVII hereof.

XVI.

[P] Despite the lack of authority of defendants Cowan, of which lack of authority defendants Bulova were fully aware, and in wilful and malicious derogation of plaintiff's rights in the premises, the defendants herein and each of them have conspired to commit and actively aided and abetted each other in the commission of the following acts:

(1) The defendants altered the motion picture containing plaintiff's said specially constructed sign and display

in a material respect, to wit, by removing the name "Gruen" therefrom; and

(2) They actually included plaintiff's said special sign and display in the motion picture as released to the general public but inserted the name "Bulova" in plaintiff's said sign and display in place of and in lieu of the name "Gruen."

Said two acts just referred to, in so far as defendants Bulova are concerned, were committed with the purpose and intent thereby to deprive plaintiff of the reasonably expected fruits of its agreements and understandings with defendants Cowan and to interfere unfairly and improperly with and to injure plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will.

XVII.

Subsequent to the filing of the original complaint herein, said motion picture "Love Happy" had what was advertised as its world premiere showing. The special advertising sign and display, which was conceived, constructed and paid for by plaintiff, has been used and "actually included" in the final version of said motion picture, but the name "Gruen" has been erased from said film by the defendants and in place thereof, the name "Bulova" has been inserted. Plaintiff is informed and believes and therefore alleges that despite the threats of defendants Cowan, to which reference is made in Paragraph XIII hereof, the said defendants Cowan would not have erased the name "Gruen" from said motion picture save and except for the fact that they were induced so to do by defendants Bulova. Plaintiff is informed and believes and therefore alleges that said motion picture now is being released and shown by

defendants Cowan at motion picture theatres throughout the United States, that unless restrained and enjoined from so doing, said defendants will continue to release and show said motion picture, including plaintiff's said display which has been mutilated and distorted as aforesaid; and, further, that defendants and each of them also are carrying out a nationwide program jointly advertising said motion picture and Bulova products; and that unless restrained and enjoined from so doing, the defendants and each of them will continue to carry out such advertising program.

XVIII.

As a result of the aforesaid actions and threatened actions by the defendants, great, irreparable and continuing injury and damage is being inflicted and will continue to be inflicted upon plaintiff and plaintiff's business, dealer relationships, competitive position, reputation and good will: (1) through the loss of unique and valuable advertising which plaintiff reasonably expected to receive, was entitled to receive and would have received if defendants Bulova had not induced defendants Cowan to breach their obligations to plaintiff (2) through the ridicule to which plaintiff has been and will continue to be subjected by the jewelry trade and the public if defendants are permitted to continue to show said motion picture containing plaintiff's special sign and display but with Bulova's name inserted therein as hereinabove alleged or are permitted to continue to advertise jointly said picture and Bulova's products as hereinabove alleged; and (3) through defendants' mutilation, distortion and use of plaintiff's said specially designed and conceived sign and display to the advantage and profit of the defendants and each of them

without plaintiff's consent and in derogation of plaintiff's rights. Unless restrained and enjoined by this Court, the defendants and each of them will continue to commit said damaging acts.

XIX.

Plaintiff has no plain, adequate or speedy remedy at law in connection with the foregoing.

XX.

As a direct and proximate result of the actions of the defendants and each of them as aforesaid, plaintiff has lost and is losing world-wide advertising of very unique and substantial value, [Q] and has lost and is losing the value of the unique stunt and special sign and display conceived by plaintiff, [R] and plaintiff and plaintiff's business, competitive position, dealer relationships, reputation and good will have likewise heretofore been and are being substantially damaged. Said damages are of such character as to be difficult of ascertainment and computation, but plaintiff estimates that it has already been damaged in an amount in excess of One Hundred Thousand Dollars ($100,000.00).

XXI.

[S] All of the aforesaid actions of defendants and of each of them were wilful, malicious and oppressive and by virtue of such wilfulness, malice and oppression plaintiff is entitled to recover damages for the sake of example and by the way of punishing the defendants and each of them in the additional sum of One Hundred Thousand Dollars ($100,000.00).

WHEREFORE, plaintiff prays:

(1) That defendants, Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be ordered to delete the name "Bulova" from said motion picture and to restore the name "Gruen" therein, and that they be enjoined permanently from again removing said name "Gruen" therefrom.

(2) That defendants, Lester Cowan, Artists Alliance, Inc., Lester Cowan Productions, Doe I, Doe II, Doe III, and Doe IV and the agents and servants of each of them be enjoined permanently from including in said motion picture "Love Happy" any shots of any display advertising in any way the products of defendant Bulova Watch Company, Inc., or of any other competitor of plaintiff.

(3) That defendants, Bulova Watch Company, Inc., Doe V and Doe VI and the agents and servants of each of them be enjoined permanently from advertising their products jointly with the motion picture "Love Happy" and from using plaintiff's said display in said picture, or at all.

(4) That plaintiff recover of and from the defendants and from each of them the sum of One Hundred Thousand Dollars ($100,000.00), general damages, and such additional sums as may have accrued to the date of the injunction hereinabove prayed for.

(5) That plaintiff recover of and from the defendants and from each of them the additional sum of One Hundred Thousand Dollars ($100,000.00), as exemplary or punitive damages.

(6) That defendants pay to plaintiff the costs of this action, and

(7) That plaintiff have such other, different and further relief as may be just.

Exhibit "A"

Webster 6156 Established 1918

Walter E. Kline
Public Relations

8445 Melrose Avenue Hollywood 46, California

June 22, 1948

Lester Cowan Productions
General Service Studios
1049 North Las Palmas
Hollywood, California

Gentlemen:

In confirmation of our present understanding it is hereby agreed as follows:

1. You have advised me of your plans and intentions to produce a feature length sound and talking motion picture presently entitled "Hearts and Diamonds," in which the Marx Brothers will be co-starred. You have further advised me that certain scenes and sequences in the picture will be devoted to the activities of one or more of the Marx Brothers in connection with various advertisings and displays.

2. Pursuant to your request therefor I have obtained from the hereinafter specified advertisers agreements in connection with your use of their respective signs and displays. Such advertisers and their signs and displays are as follows:

a. The General Petroleum Corporation whose advertising sign displays the "Flying Red Horse" in connection with its sale of Mobilgas.

b. The Fisk Tire Company whose advertising sign displays a boy and a candle bearing the slogan "Time to Retire."

c. The Brown and Williamson Tobacco Corporation (Kool Cigarettes), Ted Bates Agency.

d. The Gruen Watch Company.

e. One or more other companies using advertising signs or displays which may hereafter be included in the terms of this agreement by our mutual written statement to that effect.

3. You understand that some expense will be incurred by me or my principals in preparing for your use the above specified advertisements or displays. On behalf of my respective principals I am privileged to state that the cost of constructing such signs and displays which will be borne by my respective principals provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public; and further provided that such picture is actually released to the general public not later than January 1, 1950.

4. It is therefor understood and agreed that you will bear the cost incurred in connection with the construction and erection of any or all of such signs or displays which are not actually included in the picture substantially in the

manner presently represented to you; it being further understood that you will bear the cost of all of such signs and displays if the said picture is not released to the general public prior to January 1, 1950. At your request, of course, we shall furnish you with an itemized statement of all costs so incurred.

If the above is in accordance with your understanding of our agreement, please indicate the same by signing in the space provided therefor below.

Very truly yours,

/s/ WALTER E. KLINE.

Approved and Accepted:

LESTER COWAN PRODUCTIONS,

An Artists Alliance, Incorporated, Production, Produced by Lester Cowan.

By /s/ LESTER COWAN. [17]

Exhibit "B"

Phone GRanite 3111

Artists Alliance, Inc.
1040 North Las Palmas
Hollywood 38, California

September 10, 1948

Mr. H. L. Nations
Public Relations Director
Gruen Watch Company
Time Hill
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find some 4x5 photographs of the action of the Gruen Watch sign in the current Lester Cowan production, "Love Happy." The sign gets a tremendous play in the picture and you will note that Harpo Marx swings back and forth on the pendulum of the sign in several hundred feet of film.

In connection with this tieup, if you care to do so, send me watches which can be prominently used in connection with the picture and we will photograph them on the wrists of Vera-Ellen, Marion Hutton, and Ilona Massey, the three feminine stars of the film, and the three Marx Brothers which you may have to use as you see fit.

Kindest regards,

Cordially,

/s/ R. E. Armstrong,
Dir. of Publicity & Adv.

REA/vm
Encl.

Exhibit "C"

Phone GRanite 3111

Artists Alliance, Inc.
1040 North Las Palmas
Hollywood 38, California

October 4, 1948

Mr. H. L. Nations
Public Relations Director
Gruen Watch Company
Time Hill
Cincinnati 6, Ohio

Dear Mr. Nations:

Enclosed please find photographs of Harpo Marx swinging on the pendulum of the Gruen Watch sign. This is as closeup a shot as we could make and still show the sign.

Fred Kline of Walter Kline's office has mentioned that he has discussed a co-operative newspaper campaign with you in conjunction with the showing of this picture. If you have any details, I would appreciate same. Our first release date on the picture will be Lincoln's birthday with a world premiere in Cincinnati, followed by dates in Detroit, Chicago and New York. In all probability we will have Vera-Ellen, Ilona Massey and possibly the Marx brothers for personal appearances with the premiere.

Would also appreciate hearing your reaction to the brochure sent you regarding the proposed special train.

Kindest regards.

Sincerely,

/s/ R. E. Armstrong,
Dir. of Publicity & Adv.

REA/vm

Exhibit "D"

Note: This photostatic exhibit is omitted from this Appendix, but is set forth in full in the printed Transcript of Record. [See R. 25-29.]

No. 12528

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant.

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLEES' BRIEF.

MITCHELL, SILBERBERG & KNUPP, and
LEONARD A. KAUFMAN,
603 Roosevelt Building, Los Angeles 17,
Attorneys for Appellees, Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, doing business as Lester Cowan Productions.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX.

PAGE

III.

INDEX TO APPENDIX.

Digests of cases cited by defendants under Point II, A, of this Brief: No obligation to include the display in the final version of the motion picture can be implied so as to deprive defendants of their choice to eliminate the display and pay for it.

TABLE OF AUTHORITIES CITED.

STATUTES

TEXTBOOKS

No. 12528

IN THE

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Appellees.

APPELLEES' BRIEF.

Statement of Defendants' Contentions.

Defendants entered into a formal binding contract with a group of advertisers, one of which was plaintiff. The contract was complete on its face and unambiguous, and integrated all the essential terms of the agreement. It clearly and unmistakably provided that the advertisers were to furnish displays and that when defendants released their motion picture to the public, defendants would be obligated, in the alternative, either to include the displays as delivered by the advertisers in their picture or pay those advertisers whose displays were not used in the picture the cost of their respective displays. The contract contemplated that defendants might choose *not* to use the displays to promote the advertisers' products, and when defendants were unable to agree with plaintiff on

a joint advertising campaign, defendants did not use the display bearing plaintiff's name and paid plaintiff the cost of the display furnished by plaintiff.

In view of plaintiff's lengthy statement of the facts defendants will not at this point detail their statement of the case but will refer to the facts as they become relevant to the various questions under discussion.

It may facilitate the court's evaluation of the parties' respective contentions if defendants consider plaintiff's arguments as they appear in plaintiff's opening brief.

I.

The Parol Evidence Rule Prohibits Evidence of the Alleged Prior Oral Agreements.

The allegations regarding the alleged oral negotiations and "agreements" between the parties are to be found in paragraphs III, IV and V of the second amended and supplemental complaint (hereinafter referred to as "complaint") [R. 5-6].

The statutes involved are the following:

Section 1625, Civil Code, State of California:

> "*The execution of a contract in writing,* whether the law requires it to be written or not, *supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied* the execution of the instrument." (Emphasis added.)

Section 1639, Civil Code, State of California:

> "*When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible;* subject, however, to the other provisions of this title." (Emphasis added.)

Section 1856, Code of Civil Procedure, State of California:

> *"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be* between the parties and their representatives, or successors in interest, *no evidence of the terms of the agreement other than the contents of the writing,* except in the following cases:
>
> "1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
>
> "2. Where the validity of the agreement is the fact in dispute.
>
> "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an *extrinsic* ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties." (Emphasis added.)

Plaintiff's discussion of this problem confuses two questions: (1) Is the contract intended to express the entire agreement of the parties? and (2) Are the words used ambiguous? Plaintiff apparently contends, first, that there is no integration because, by using the words "agreements" in paragraph 2 of the contract [R. 20], Kline, plaintiff's agent who drafted it, incorporated certain prior oral agreements into the written contract, and, second, that even if there is an integration, certain words are ambiguous. Defendants contend that the writing *is* an integration, that all the terms are expressed, that there are no ambiguities and that, in any case, the words which plaintiff labels as ambiguous are irrelevant to the question whether defendants could rightfully eliminate the display from their picture by paying its cost.

A. The Written Contract Is an Integration; the Written Contract Does Not Incorporate by Reference Any Prior Oral "Agreements."

It is a question of law for the Court whether a writing is a complete expression of the agreement of the parties. *The Court must determine this question from the four corners of the instrument.*

Thoroman v. David, 199 Cal. 386;

Heffner v. Gross, 179 Cal. 738;

Harrison v. McCormick, 89 Cal. 327.

In the *Thoroman* case, the complaint alleged an agreement between the parties under the terms of which defendant sold to plaintiff certain real property and furniture. Defendant's answer denied that furniture was included in the sale. Plaintiff first introduced escrow instructions which related to the real property only and over defendant's objection then introduced evidence that prior to the signing of the escrow instructions, defendant stated that the furniture was to be included.

Judgment for plaintiff reversed.

> "It is the contention of the plaintiff that the said escrow instructions did not constitute such a written contract as expressed the complete understanding of the parties and that the oral evidence was admissible to supplement the written expression of their understanding. It is the position of the defendant that the said agreement was complete and fully expressed the intention of the parties and that the admission of the oral evidence was in contravention of the well established rule codified in sections 1625 and

1698 of the Civil Code and in section 1856 of the Code of Civil Procedure, and as approved in such cases as *Harrison v. McCormick,* 89 Cal. 327 (23 Am. St. Rep. 469, 26 Pac. 830), *Benson v. Shotwell,* 103 Cal. 166 (37 Pac. 147), and *Heffner v. Gross,* 179 Cal. 738 (178 Pac. 860). In the Harrison case the rule is thus stated: *'The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: "If it imports upon its face to be a complete expression of the whole agreement,—that is, shows such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing whatever on the particular one to which the parol evidence is directed."'* . . . The entire consideration passing to the respective parties is expressed in the instrument and the defendant received nothing not called for therein. When so read and considered the instrument contains all the necessary elements of a contract and is to be regarded as a contract in writing between the parties." (Pp. 389-390; emphasis added.)

The written contract [which is attached to the complaint as Exhibit "A"] [R. 20-22] appears on its face to be a complete agreement. The parties and the consideration are expressed. Kline, plaintiff's agent, who drafted this instrument, sets out certain recitals in paragraph 1 and states that he has obtained from his principals, agreements in connection with defendants' use of their respective displays. After naming the advertisers whom he intends to be parties to the agreement, he then sets out

the terms of the understanding and it is clear that he intends to set out all of the terms:

(1) The very first sentence of the written contract reads: *"In confirmation of our present understanding, it is hereby agreed as follows:"* There is no doubt that what follows is intended to be the entire "present" understanding of the parties.

(a) The purpose of a "confirmation" is to set forth the writer's understanding of an agreement to see if it coincides with the understanding of the other party.

(b) It would border on the ridiculous to write, "it is hereby agreed as follows:" and then refer to prior oral agreements without stating those agreements. What was the purpose of Kline's letter? Merely to remind defendants that the parties had already entered into some unspecified oral agreements?

(c) The contract refers to the parties *"present"* understanding.

Restatement of Contracts, Section 228, illustration 2:

"A and B make an oral contract by which A agrees to employ B on certain terms of employment. Immediately thereafter *B writes A a letter beginning, 'Confirming our oral arrangement this morning.'* B then proceeds to state the contract as he understands it. He does not, however, state it in all respects accurately. A makes no reply to the letter. A, thereafter, allows B to enter on the agreed employment. There is an integration. A's acquiescence in B's version of the contract by acceptance of services is a manifestation of assent to the writing as a final and complete expression thereof." (Pp. 308-9; emphasis added.)

In case at bar, both parties acquiesced in the written version of contract by signing it.

(2) It is most obvious, especially to the ordinary reasonable businessman, that Paragraph 2 of the contract is introductory, and serves the sole purpose of identifying the advertiser-parties; that "the essential part of the memorandum agreement dated June 22, 1948 is contained in Paragraphs 3 and 4 . . ." [Comments of District Court, R. 44], and that the parties intended the writing to represent their entire agreement. The identity of each party is made clear and the duty of each is expressed naturally and unambiguously. It is only the desperate dissection of counsel which produces this late afterthought of plaintiff [R. 44].

(3) In Paragraph 2(e) Kline writes, "One or more other companies using advertising signs or displays which may hereafter be included in the terms of *this agreement* by our mutual written statement to that effect." (Emphasis added.) These underscored words show unmistakably that the entire understanding of the parties was embodied in this written contract and was not embodied partially in the written agreement and partially in a prior oral agreement. Furthermore, it would be most unreasonable for the parties to arrange to enter into future written statements to the effect that subsequent advertisers were to be covered by a written instrument which, in turn, merely confirms earlier, unspecified oral agreements.

(4) The last sentence of the written contracts reads: "*If the above is in accordance with your understanding of our agreement,* please indicate the same by signing in the space provided therefor below." (Emphasis added.) This language is explicit in referring to the "above" *written* terms as the entire agreement of the parties.

(5) When parties enter into written contracts, the presumption is that they have *expressed* all the conditions by which they intended to be bound.

Foley v. Euless, 214 Cal. 506, 511-512, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368-9 (Affirmed 173 P. 2d 6);

Loyalton Electric Light Company v. California Pine Box & Lumber Company, 22 Cal. App. 75, 77;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 796.

(6) If the parties had intended defendants to have no choice whether to include the display in the motion picture, it would have been natural for Kline to state very simply that "you (Cowan) agree to use these signs in the final version of your picture unless due to circumstances beyond your control." That is the element with respect to which plaintiff wishes to vary the written contract. It is unreasonable on the part of plaintiff to argue that Kline set out the entire contract except this one sentence, which is the heart of the alleged entire agreement, but incorporated it by reference by referring to unspecified "agreements."

(7) The writing is not a casual memorandum, as implied by plaintiff; it is a formal, composed and complete contract, with preambles, numbered paragraphing and careful expression of the terms and conditions.

It is submitted that the written instrument is an integration and that the natural and only interpretation is that the parties intended it to stand alone without supplementation by a portion of their prior oral negotiations or agreement.

The District Court wrote:

> "These clauses [Paragraphs 3 and 4 of the contract] mean that, in view of the fact that certain advertising signs required special outlays of moneys in their construction, Kline's principals—the plaintiff among them—will bear the cost of construction, provided they are included in the 'final version' of the picture. If not, the only penalty is that the defendants would 'bear the cost incurred in connection with the construction and erection' of the 'signs and displays.' By these undertakings, the parties have laid down the conditions of liability. And *no atomizing of the phraseology or expository of references to 'intentions,' 'undertakings' or 'agreements' can destroy the binding finality of the simple, unequivocal obligation contained in these two paragraphs.*" [R. 45; emphasis added.]

B. The Alleged Prior Oral "Agreements" Are Inconsistent With the Written Contract.

The situation, here, is identical with that presented in the *Thoroman* case, set out above. Defendants promised in writing to pay for the sign if it wasn't used; thus the consideration coming from defendants was considered in the written agreement and expressed therein. Plaintiff cannot enlarge defendants' obligations by evidence of a prior oral agreement. Plaintiff is attempting not only to add an entirely different and additional undertaking on the part of defendants(*i. e.*, an obligation in addition to that of paying for the sign if defendants don't use it)—and this with no additional corresponding obligation on the part of plaintiff—but is also actually attempting to vary the terms of the written contract.

The District Court found implied in fact an absolute choice on the part of defendants to use the display or not to use it and pay for it—the choice to be determined at the time Cowan released the picture. The implication is as much a part of the written contract as are the terms which are expressed therein.

> *Delaware & Hudson Canal Company v. Pennsylvania Coal Company,* 19 L. Ed. 349, 353, 8 Wall. 276;
>
> *Calpetro P. Syndicate v. C. M. Woods Co.,* 206 Cal. 246, 250.

That such implication is proper is clear. It is submitted that there is no reasonable doubt that it is defendants who were to determine whether to include the display in the final version of their motion picture or not. It is only defendants who *could* control the contents of the picture. Moreover, it would be totally unreasonable if *plaintiff* could insist that the display not be included in the picture and then demand that they be paid for it.

The principle, embodied in Section 1448, Civil Code, State of California:

> "*Who has the right of selection.* If an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of selection, unless it is otherwise provided by the terms of the obligation."

is also the holding of the other authorities:

> *Restatement of Contracts,* Section 325, Comment c;
>
> *Blake v. Paramount Pictures,* 22 Fed. Supp. 249, 253 (applying California law);
>
> *Harbor City Canning Co. v. Dant,* 201 Cal. 79, 84, 255 Pac. 795;

Foley v. Euless, 214 Cal. 506, 513, 6 P. 2d 956;

Standard Appliance Co. v. Standard Equipment Co., 296 Fed. 456;

Leezer v. Fluhart, 105 Wash. 618, 178 Pac. 817, 818.

Brockton Olympia Realty Co. v. Lee, 266 Mass. 550, 165 N. E. 873, 876.

In the *Blake* case, *supra,* plaintiff alleged that defendant had orally represented that it would deliver, during the season, a group of specified motion pictures, that defendant had no intention of so delivering the pictures and that defendant fraudulently withheld them and sought to sell them for the following season at increased rentals. The Court, sustaining defendant's demurrer, pointed out that the written contract, in effect, gave defendant a choice of substituting other pictures for those orally named by defendant and wrote:

> "It is elementary that, if one promises to do one thing, or failing, do another, no fraud can result if he made the original promise only without intention to perform; for even if he did, he protected himself by the substitution. And he who has agreed to accept something else for the original promise cannot complain of the fraud in the making of the first one only. Otherwise, the right to elect between alternative obligations would be nullified. This is an important right, codified into the law of California. *When an obligation calls for the performance of one of two acts, in the alternative, the person required to perform has the right to choose.* California Civil Code, §1448." (P. 253; emphasis added.)

It is interesting to note that, in the *Blake* case, the defendant is accused of exercising his choice negatively for the purpose of securing greater revenue for itself, just as, in the case at bar, defendants are "accused" of exercising their choice negatively for the purpose of securing plaintiff's (and if not plaintiff's, then plaintiff's competitor's) participation in the joint advertising program [R. 24, 12]. As to this, Judge Yankwich wrote in the *Blake* case:

> "But the producer-distributor, evidently anticipating that he might not be able to produce the particular productions or that he might not desire to market them within the year or for other reasons,—*perhaps it was the reason advanced by the plaintiff that the distributor might desire to ask a greater price for them later, which, in itself, is merely an incident to the exercise of economic power over production,*—reserved to himself the right of substitution." (P. 252; emphasis added.)

If a contract were to provide that A transfer a designated piece of land to B and that B, at a specified time, was either to keep the land and pay for it or return the deed to A, there could be no question that B, at his sole and unconditional pleasure, had a choice of two alternative performances. It is not conceivable that a promise on the part of B could be implied that he would return the deed only "under circumstances beyond his control," nor would parol evidence be admissible of a prior oral understanding of the parties that B was to return the deed (and not pay for the land) only "under circumstances beyond his control." That is, a choice need not be expressed by using the word "choice." The clear implication of the above hypothetical contract provisions is that B has

such a choice and the hypothetical case is in principle identical with the one at bar.

In *Arthur v. Baron De Hirsch Fund,* 121 Fed. 791, 795, the parties had executed a written contract under the terms of which defendant agreed to loan plaintiff a certain sum to be used in the erection of houses on land belonging to plaintiff, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendant should name. *If defendant did not name a grantee when a house was finished, plaintiff was to lease the house.*

On failure of defendant to provide purchasers for the houses, plaintiff sued for breach of contract. The trial judge directed verdict for defendant at the close of plaintiff's evidence. Affirmed.

This case is discussed below (in connection with plaintiff's theory that an absolute promise on the part of defendants to use the display should be implied in plaintiff's favor) and defendants will not repeat that discussion here beyond repeating one paragraph of the opinion which is immediately relevant:

> "'*When it is apparent that the parties had the subject in question in mind, and either has withheld an express promise in regard to it, one will not be implied.*' *Zorkowski v. Astor,* 156 N. Y. 393, 50 N. E. 983. *That the parties contemplated that the defendant might not find purchasers is plain, because the contract provides that, if the defendant does not name the grantee 'as soon as the house is finished,' the plaintiff is to let or lease every one of the houses* at specified monthly rentals, no term of lease being fixed. It is true *this provision contemplates that the houses are to be leased to tenants to be secured*

*by the defendant, but nevertheless it denotes their understanding that the defendant might not secure purchasers, * * * This provision is quite inconsistent with the theory that the parties understood or intended that the defendant should be bound to produce purchasers."* (P. 795; emphasis added.)

In the language of the above quoted case, it is apparent that defendants and Kline had the subject of defendants' use of the display in mind and that defendants withheld an express promise in regard to it. That the parties contemplated that defendants might decide not to use the display in his picture is plain, because the contract provides that if defendants do not use the display in the final version of their motion picture, plaintiff is entitled to be reimbursed for the cost of the display. It is true that the provisions of Paragraphs 3 and 4 of the June 22nd contract contemplate that defendants *might* decide to use the display, but nevertheless denote their understanding that they might decide *not* to use it. These provisions are *"quite inconsistent with the theory that the parties understood or intended that the defendant should be bound"* to use the sign. Thus, parol evidence of a prior oral agreement that defendants would use the sign in the final version of their motion picture (except under circumstances beyond his control) would vary the terms of the written contract.

If the parties here, had intended that defendants be absolutely obligated to use the sign (except under circumstances beyond his control) the parties would have said so expressly. As the Court said in the *Arthur* case (in response to plaintiff's contention) "if this was the understanding of the parties, *why was this most important covenant omitted?"*

Defendants respectfully refer the Court to the language of the cases quoted below (Point II, A) in connection with plaintiff's argument that a definite promise to use the display should be implied. These cases, like the *Arthur* case, hold that *if a written contract expresses the consequences of failure on the part of one party to do a specified act, then he is not obligated to do that act, and evidence of an oral understanding that he is so obligated* IS *"quite inconsistent" with the written contract.*

C. If a Writing Upon Its Face Appears to Be an Integration Parol Evidence Cannot Be Admitted to Add Another Term to the Agreement, Even if Not Inconsistent With It.

Even if the alleged two prior oral "agreements" were not inconsistent with the written contract, evidence of them is inadmissible.

Thoroman v. David, 199 Cal. 386, 389;

Heffner v. Gross, 179 Cal. 738;

Calpetro P. Syndicate v. C. M. Woods Co., 206 Cal. 246, 251-2.

> "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be . . . no evidence of the terms of the agreement other than the contents of the writing . . ."

Section 1856, Code of Civil Procedure, State of California.

Thus, inconsistency is not required to bar, as a matter of substantive law, evidence of a prior or contemporaneous oral agreement.

D. The Complaint Itself Demonstrates That the Word, "Agreements," Cannot Refer to a Definite Promise by Defendants to Use the Display.

In attempting to circumvent the parol evidence rule, plaintiff artifically divides the prior oral negotiations into *two* separate "agreements":

Plaintiff alleges in Paragraph III of the complaint [R. 5] that the parties orally agreed that defendants would definitely use the display in the motion picture. Plaintiff alleges in Paragraph IV of the complaint [R. 5-6] that:

> "Concurrently with the agreement referred to in paragraph III, and in recognition of the fact that due to circumstances beyond the control of defendants Cowan, it might be necessary to cut the scene containing plaintiff's display from said picture, it was understood and agreed between plaintiff and the defendants Cowan that in such event defendants Cowan would bear the cost of such sign and display."

Reading Paragraphs III and IV together, it is clear that plaintiff seeks to allege a prior oral agreement that defendants would use the display unless it were necessary to cut it out because of circumstances beyond their control.

If the word, "agreements," of the introductory Paragraph 2 of the written contract was intended to incorporate a prior agreement between plaintiff and defendants, it would naturally be expected to incorporate the *entire* prior oral agreement. That, however, is not possible here, since Paragraph 4 of the written contract expresses *part* of the alleged prior oral agreement and, in view of this, it would be strange that Paragraph 2 incorporate the *entire prior agreement*. (And, as already pointed out, it

is made doubly strange by the fact that the written contract expresses only a *subsidiary* term and not the alleged *essential* one.) Faced with this problem, plaintiff meets it by its queer division of the alleged prior agreement into two "agreements"—one which is incorporated by reference into the written contract and the other which is not [Paragraph V of Complaint, R. 6].

Aside from the obstacle that the alleged prior oral agreements are inconsistent with the written contract (Point I, B, *supra*), that the written contract is an integration (Point I, A) and the unreasonableness of its two-concurrent-prior-oral-agreements theory, plaintiff is faced with a difficulty of logic which, it is suggested, demonstrates that the word, "agreements," of Paragraph 2 of the contract *cannot* refer to a definite promise on the part of defendants that they would use the display.

Kline, plaintiff's agent, wrote, in Paragraph 2 of the contract which he addressed to defendants, that he has "*obtained from the hereinafter specified advertisers* agreements in connection with your use of their respective signs and displays" [R. 20; emphasis added].

The complaint [Paragraph III, R. 5] alleges that Kline, *himself,* on behalf of plaintiff, entered into the oral agreement with defendants that defendants definitely use the display. Therefore, *this alleged prior oral agreement cannot be the one which Kline "obtained from the hereinafter specified advertisers."* That is, Kline would not write to defendants that he had received from his clients an agreement which *he himself* had already entered into with defendants. It is clear that when Kline wrote that he had obtained "agreements" from certain advertisers, he was saying that he had obtained their assent to a deal, and Kline then proceeds to set out the terms

of the deal. It is clear that Kline is referring to his receipt of such assent on the part of the various advertisers and not to any agreements, in the sense of *contracts* that Cowan would definitely use the sign in his picture. *Kline could not have received from plaintiff a promise on the part of defendants to use the display.*

E. The Words and Phrases Designated by Plaintiff as "Ambiguous" Are Not Ambiguous, and, Moreover, Have No Bearing on the Question Whether Defendants Were Definitely Obligated to Use the Display.

(1) The phrase "plans and intentions" (Pltf. Op. Br. 12, 17) is found in Paragraph 1 of the written contract (which is a *recital* or preamble to the agreement). It is not true that "such plans and intentions are not set forth"; the paragraph reads:

> "1. You have advised me of your plans and intentions to produce a feature length sound and talking motion picture presently entitled "Hearts and Diamonds," in which the Marx Brothers will be co-starred. You have further advised me that certain scenes and sequences in the picture will be devoted to the activities of one or more of the Marx Brothers in connection with various advertisings and displays."

The phrase is not ambiguous.

Even if it were ambiguous, it still is *irrelevant to the performance promised by defendants in the agreement.* It is this performance, required of defendants by the contract, which is the "matter" with which we are now concerned. (See *Civ. Code,* Sec. 1625, *supra.*) *If* the complaint were deficient in that it failed to show a promise

by defendants which they failed to perform, *the resolution of an ambiguity relating to defendants' "plans and intentions" would cure this deficiency of plaintiff's case.*

(2) The word "request" (Pltf. Op. Br. 12-13, 17) is found in Paragraph 2 of the written contract (which, too, is merely a preamble). The observations made above in connection with item (1) are applicable here; moreover, defendants' request that Kline line up advertisers for a deal has no bearing on the content of the contract entered into.

(3) The word "agreements" (Pltf. Op. Br. 12-13, 17) also is found in Paragraph 2 of the written contract and is not *ambiguous.* The meaning of the word is clear; the only possible question could be whether, by the use of that word, the written contract incorporates terms not expressed therein; that is, whether the use of the word shows that the written contract is not an integration so far as defendants' required performance is concerned. This aspect of the case was fully discussed above (Point I, A).

(4) The word "use" (Pltf. Op. Br. 13, 17) is found in the same sentence of the preliminary recital of the written contract as the word, "agreement." It adds nothing to plaintiff's argument; the sole question still is whether the word, "agreement," must be construed to mean that the written contract is incomplete in the particular with which we are concerned.

(5) There is no conceivable difference between the words "included" and "actually included" (Pltf. Op. Br. 13, 17) found in Paragraphs 3 and 4 of the written contract. How can a sign be included in a motion picture other than "actually"?

(6) Any ambiguity in the phrase "substantially in the manner represented to you" (Pltf. Op. Br. 17-18) is irrelevant to the question whether defendants were obligated to use the display. Whatever the "manner represented" may have been, defendants either did or did not use the display "substantially in the manner represented"; if they did, plaintiff got what it is now arguing for; if they did not, plaintiff was entitled only to be reimbursed for the cost of the sign. In any event plaintiff admits that "this particular clause may not necessarily be material to the present dispute." (Op. Br. 17.)

Finally, the complaint nowhere alleges that the prior oral "agreements" contained any terms which *would* explain the words "substantially in the manner represented to you" (or any of the other of the above discussed words or phrases which plaintiff contends are ambiguous).

Plaintiff states (Op. Br. 13) that the written contract does not specify "(a) whether one of the parties was to have the right of determining whether or not such inclusion was to take place, or (b) whether such determination was not in fact intended by the parties to be governed by matters beyond the control of either party."

Defendants discussed plaintiff's contention (a) above (Point I, B). "The party required to perform has the right of selection" (Civ. Code, Sec. 1488).

Whether defendants' absolute right of selection can be limited by evidence of prior oral "agreements" has also been discussed above.

F. Authorities Cited by Plaintiff.

Plaintiff refers to the alleged oral agreements as "contemporaneous" (Op. Br. 14). The complaint alleges that they were not contemporaneous, but *prior*: after setting out the so-called oral agreements in Paragraphs III and IV, plaintiff alleges in Paragraph V [R. 6] that "*thereafter* * * * plaintiff and defendants Cowan executed memorandum of agreement dated June 22, 1948." (Emphasis added.) But whether contemporaneous or prior, the alleged oral agreements are barred. Civil Code, Section 1625, *supra,* expressly refers to stipulations "which preceded or accompanied the execution of the instrument."

Simmons v. California Inst. of Technology, 34 Cal. 2d 264, 172 P. 2d 665 (Pltf. Op. Br. 14-15), was, unlike the case at bar, one of *fraud,* and, of course, the parol evidence rule has no application. In fraud cases the only requirement for the admissibility of an alleged contemporaneous fraudulent promise is that it not vary the expressed terms. If it does not, it will be admitted even if the writing appears on its face to be complete. Not so when fraud is not alleged: if the writing appears to be an integration, evidence of prior oral agreement is in no event admissible. (See Point I, C, *supra.*)

Moreover, in the *Simmons* case, the subject matter of the oral agreement was entirely different from the subject matter of any of the terms of the written agreement. As the Court said:

> "'* * * a distinction must be made between * * * a parol promise * * * which by its very nature is superseded by the final writing, inconsistent with it, *and a promise made with no intention of performing the same, not inconsistent*

with the writing, but which was the inducing cause thereof.'" (P. 274.)

Detsch & Co. v. American Products Co., 152 F. 2d 473, also cited by plaintiff (Op. Br. 15) merely held that a contemporaneous oral agreement was admissible to "make certain the content and extent of the broad and undefined word 'cooperate' in the written contract." (P. 474.) As pointed out above, the question before the Court here does not relate to ambiguous language.

In *Webb v. Cobb* (Ark. 1926), 288 S. W. 897 (Pltf. Op. Br. 15), where a building contract required that work be done "in keeping with plans and specifications," extrinsic evidence, of course, was admissible to show what those "plans and specifications" were.

If, in the instant case, the written contract had contained language which indicated that the parties thereto had entered into prior oral agreements in addition to the terms of the written document and meant to incorporate those prior oral agreements, then they could be shown by extrinsic evidence. But that is not the case here. Defendants' point is that there *is* no incorporation by reference.

In *Kellog v. Snell,* 93 Cal. App. 717, 270 Pac. 232 (Pltf. Op. Br. 15-16), the contract provision that buyer "accept a position with said bank under conditions *otherwise* agreed upon" of course requires extraneous evidence of what the parties *"otherwise"*—that is, otherwise than in the written contract—agreed upon. The Court itself italicized the phrase *"otherwise agreed upon"* and wrote:

> "The written contract itself specifically contemplates an agreement for this employment upon terms not included within this written document, for it is therein specified that respondent would 'accept a posi-

tion with said bank under conditions *otherwise agreed upon.'"* (P. 720.)

In *Schmidt v. Cain,* 95 Cal. App. 378, 272 Pac. 803 (Pltf. Op. Br. 16), the Court wrote:

> "* * * that parol evidence of the terms and conditions of a contemporaneous oral agreement is competent and admissible, *which does not vary or conflict with the specific provisions of the written instrument."* (P. 382.)

but that

> "* * * the rule contended for by appellant has no application here, because there was a collateral contemporaneous oral agreement containing terms and conditions, upon which the written instrument is entirely silent." (P. 382.)

Compare *Restatement of Contracts, Section 228, Illustration 2:*

> "A and B make an oral contract by which A agrees to employ B on certain terms of employment. Immediately thereafter B writes A a letter beginning, 'Confirming our oral arrangement this morning.' B then proceeds to state the contract as he understands it * * * there is an integration * * *"

In the case at bar the letter begins, "In *confirmation* of our *present* understanding it is *hereby* agreed *as follows:* * * *" [R. 20]. And in the case at bar, the written contract is *not silent* on the matter of defendants' obligation (as was shown above), while in the *Schmidt* case it said nothing whatsoever about warranties. The arguments set forth above (Points I A, B and D) all are applicable to the contract in the case at bar but not to that in the *Schmidt* case.

It is suggested that the other cases cited by plaintiff in this section of its brief are not in point. These cases

involved the interpretation of the language of the written agreement—language which was ambiguous, meaningless, technical or inconsistent. The language was such as to

> "admit of two interpretations * * * The trial court should therefore have permitted appellant to plead and prove the surrounding circumstances, not for the purpose of varying the terms of the written instrument, but for the purpose of aiding the court in interpreting the contract of the parties as embodied in the written instrument."
>
> *Wachs v. Wachs,* 11 Cal. 2d 322, 326 (Pltf. Op. Br. 18-19).

The "sense and meaning of the words themselves may be investigated."

> *Body-Steffner Co. v. Flotill Products Incorporated,* 63 Cal. App. 2d 555, 562 (Pltf. Op. Br. 19-20).

"Special, technical, definite and peculiar meaning" may be explained.

> *California Canning Peach Growers v. Williams,* 11 Cal. 2d 221, 229 (Pltf. Op. Br. 20).

An "uncertainty upon the face of the contract" such as the phrase "suitable for the needs of the owner" may be explained.

> *Crawford v. France,* 219 Cal. 439, 444 (Pltf. Op. Br. 20-21).

As pointed out above, we are not here concerned with ambiguities of language: (a) there are no ambiguities; (b) the alleged ambiguities relate to matters not relevant and the resolution of which could not cure the deficiencies of plaintiff's pleading. We are concerned with the sole question of whether the June 22nd contract purports on its face to be an expression of the agreement of the parties as to defendants' required performance.

II.

No Obligation Can Be Implied With Respect to Defendants' Use of the Display.

A. No Obligation to Include the Display in the Final Version of Motion Picture Can Be Implied so as to Deprive Defendants of Their Choice to Eliminate the Display and Pay for It.

Nowhere in the written contract do defendants promise or agree under any circumstances, to include any shots of plaintiff's sign in their picture. No such promise or agreement can possibly be implied since the agreement itself indicates clearly that the only obligation defendants undertake is to bear the cost of the sign in the event they determine not to use it in the picture [see District Court's Comment, R. 45]. The agreement expressly contemplates that defendants may decide *not* to use the sign in the picture; it provides that the advertisers bear the cost "provided that their respective advertising signs and displays are included in the final version of your picture as released to the general public" (Paragraph 3 of agreement) and that if the sign is not included in the picture, then defendants are to bear its cost (Paragraph 4 of agreement).

The legal principles by which the Court may be guided in determining this point may fairly be summarized as follows:

(1) A promise will be implied only where an act which one of the contracting parties is bound to perform can be done by him only if something of a

corresponding character be done by the opposite party. In such a case, a correlative obligation on the part of the opposite party may be implied for the purpose of enabling the first party to fulfill his obligation.

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 8 Wall. 276.

(a) Only such provisions will be implied as are indispensable to effectuate the intention of the parties as it arises from the language of the contract.

Amalgamated Gum Co. v. Casein Co. of America, 146 Fed. 900, 908, 909, 915;

Walter R. Cliffe Co. v. Du Pont Engineering Co., 298 Fed. 649, 651.

(b) When parties have entered into written contracts, courts are reluctant to enlarge them by implication, the presumption being that they have expressed all the conditions by which they intended to be bound.

Foley v. Euless, 214 Cal. 506, 511-512, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368-9 (Affirmed 173 P. 2d 6);

Loyalton Electric Light Company v. California Pine Box & Lumber Company, 22 Cal. App. 75, 77;

Arthur v. Baron De Hirsch Fund, 121 F. 791, 796.

(2) Even if the contentions of (1), above, are satisfied, an implied promise cannot be found if the expressed language of the agreement either negatives such implication, or is intentionally silent on the point. The agreement is held to be so intentionally silent when the parties expressed themselves on the point but did not express the promise sought to be implied.

Walter R. Cliffe Co. v. Du Pont Engineering Co., 298 Fed. 649;

Foley v. Euless, 214 Cal. 506, 511, 6 P. 2d 956;

Tanner v. Olds, 166 P. 2d 366, 368 (Affirmed 173 P. 2d 6);

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795, 796;

Ericksen v. Edmonds School Dist No. 15, 125 P. 2d 275, 280;

Railroad Service and Advertising Co. v. Lazell, 200 App. Div. 536, 537.

(a) *The statement of the consequences to follow in the event one party fails or refuses to do a certain act, prevents the implication that that party agreed to do that act. In such a case, the party has an option to do or not to do the act.*

Amalgamated Gum Co. v. Casein Co. of America, 146 Fed. 900, 908, 909, 910-911, 913-914;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795-796.

(3) Parol evidence is not admissible to establish an implied promise; such promise must be gathered from the language of the contract.

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 353, 8 Wall. 276;

Maryland v. B. & O. Railroad Company, 22 L. Ed. 713, 714, 22 Wall. 105;

Arthur v. Baron De Hirsch Fund, 121 Fed. 791, 795.

The facts and pertinent language of the cases cited under this Point II, A, are set out, for the convenience of the Court, in the Appendix.

Not only is the covenant which plaintiff seeks to imply not "indispensable" but is *negatived* by the written contract itself: The provision that defendants pay the cost of the display if they do not include it in the final version of their motion picture indicates that defendants might choose *not* to so include it.

In *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.,* 19 L. Ed. 349, 8 Wall. 276 (set out in the Appendix), plaintiff spent $900,000.00 improving its canal in anticipation of large shipments of coal to be made by defendant pursuant to their written contract. When defendant induced plaintiff's competitor to construct a railroad and shipped its coal over the competitor's road, plaintiff sought damages on the theory that defendant impliedly agreed to use plaintiff's canal. The Supreme Court held in defend-

ant's favor under circumstances much more favorable to plaintiff than in the case at bar: (a) plaintiff there, unlike Gruen, was *not* compensated for its expenditures, and (b) there was no provision in the written contract as to an alternative obligation on the part of defendant if defendant did not ship its coal through plaintiff's canal. The Court said that

> "it is quite evident that the plaintiffs were willing to accept the *prospect* of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement." (P. 354; emphasis added.)

B. A Covenant of Good Faith Cannot Be Implied to Aid Plaintiff.

Plaintiff contends (Op. Br. 22) that the court should find in the written contract an implied covenant of good faith which imposes two duties on defendants.

The first alleged duty is to use defendants' best efforts to include the display in the picture. In this connection plaintiff cites *Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88, 118 N. E. 214 (Op. Br. 23). The Court in that case wrote:

> "The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties." (P. 214.)

And

> "The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business 'efficacy, as both parties must have intended that at all events it should have.' Bowen, L. J., in the Moorcock, 14 P. D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement." (Pp. 214-215.)

In the case at bar, the written contract expressed the consequences of not using the display, so that the parties obviously contemplated that defendants might choose not to use it. Not only was this not true in the *Wood* case, but, as can be seen from the above quoted portions of the opinion, it affirmatively appeared that the exclusive licensee was to have certain duties in return for receiving the privileges. If, in the *Wood* case, the written contract had stated that the exclusive licensee was to pay $10,000 if he chose not to exploit plaintiff's designs, there would be no question that damages could not be recovered against

him for failure to exploit the designs, if he paid the $10,000. Moreover, in the *Wood* case the contract would have been entirely nugatory without such an implied covenant on the part of the exclusive licensee. This is the classical situation in which a promise will be implied.

Plaintiff asserts (Op. Br. 24) that unless there is an implied obligation on the part of defendants to use the display, "the letter memorandum was no agreement at all." This assertion is patently untrue, for defendants, like all promisors who obligate themselves to perform one of several alternative obligations, were obligated to, and did, perform one of those alternative obligations: it paid the cost of the display.

The following cases cited by plaintiff (*Brawley v. Crosby Research Foundation, Inc.* (1946), 73 Cal. App. 2d 103, 166 P. 2d 392; *Universal Sales Corp. v. California Press Mfg. Co.* (1942), 20 Cal. 2d 751, 128 P. 2d 665; *Clayton & Waller, Ltd. v. Oliver* (1930), A. C. 209; *Marbe v. Edwards, Ltd.* (1928), 1 K. B. 269, and *Mills-Morris Co. v. Champion Spark Plug Co.* (C. C. A. 6, 1925), 7 F. 2d 38) (Pltf. Op. Br. 25-28), are subject to similar criticism. In none of these cases did the agreement provide alternative obligations, nor express in any manner the obligations of the defendant if he failed to perform the first obligation.

It is submitted that *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608, may have been presented by plaintiff in a misleading manner (Op. Br. 25-27). The contract in that case provided that, *as to machines furnished by*

defendant, plaintiff was to advance the cost and, on termination of the agreement, defendant was to repay their cost to plaintiff upon the return of the machines by plaintiff to defendant; as to machines *not* furnished by defendant, they were to be turned over to plaintiff at cost price "on her or their election to so purchase them." The controversy concerned *machines which defendant furnished to plaintiff,* that is, machines as to which defendant definitely promised to reimburse plaintiff. Defendant contended that she had an option to purchase or not to purchase these machines by virtue of the contract provision which related to machines *not* furnished by defendant. The case is not relevant to any question which arises in the case at bar.

The balance of this section of plaintiff's Opening Brief relates to matters which plaintiff takes up in detail in a later portion of its brief (relating to "estoppel") and defendants will not now discuss those matters except to point out that the complaint does not allege that defendants *requested* the release of publicity by plaintiff, as stated by plaintiff (Op. Br. 29).

The second duty which plaintiff asks this Court to impose upon defendants, as part of the implied covenant of good faith, is "to avoid the use of plaintiff's sign and display in the monstrous manner in which it ultimately utilized it in this case, to-wit, with the name of one of plaintiff's competitors affixed thereto." (Op. Br. 22.) Plaintiff cites no authority whatsoever for this contention but discusses it under its Point IV, and defendants will discuss it later in this brief.

III.

Defendants' Conduct Subsequent to Execution of the Contract.

> "Cowan had complete freedom of action, as between the two methods of benefitting from the contract, *up to and including the actual incorporation and use of the set-up in the 'final version' of the picture.*" Comment of District Court [R. 48; emphasis added.]

Plaintiff argues that, even granting this original freedom of action on the part of defendants, they deprived themselves of that freedom—that choice between two alternative obligations—by their conduct between the time they executed the contract and the time they finally released the motion picture to the general public.

A. Defendants Made No Binding Election to Use the Display.

1. No "Option" Existed Which Defendants Could Elect to Exercise.

An option, legally and in the sense the word was used in the cases cited by plaintiff, is a continuing offer. *An option is an offer of an act or a promise on the part of the optionor in return for an act or promise on the part of the optionee.*

At the time the defendants authorized the Life article and did the other acts upon which plaintiff rely as constituting an "election," plaintiff had performed everything it was obligated to perform under the terms of the June 22nd contract; that is plaintiff had already furnished the display [Complaint, Par. VII, R. 7]. There were no offers open, pending or unaccepted. There was

nothing for defendants to accept. Defendants simply had a choice between two alternative obligations to be exercised at the time the picture was released; they either had to use the Gruen display or pay for it. The language of the law of "options" is, therefore, irrelevant.

The situation before this Court is exactly the same as in this hypothetical case: A and B execute a contract under the terms of which A agrees to give B an automobile on January 1st and B agrees to give A, on July 1st, either a horse or a cow, whichever he, B, may choose. On January 1st, A delivers the automobile. On February 1st, five months before B is obligated to render one of the two alternative performances, B tells A that he intends to give A the horse. Whatever may be A's right on an *estoppel* theory, there is no question of option, in the legal sense, involved. On February 1st, when B made his statement of intention, there was no offer remaining, from A to B, which had not been accepted; and, since an option is but a continuing offer, none existed in the illustration given, nor in the case at bar.

In a situation where a real option exists, the exercise of the option creates a binding promise on the part of the optionor and a binding promise on the part of the optionee. In the case at bar, plaintiff seeks to obtain additional consideration from the "optionee" defendants, without any additional consideration moving from plaintiff and without plaintiff promising anything additional. Specifically, by virtue of the alleged "election," plaintiff asserts that defendants gave up the privilege of determining, at the time of the final release of the picture, to omit the display from the picture, while plaintiff gives nothing by way of an act or a promise, in return for Cowan thus limiting his freedom.

The District Court outlined its analysis as follows:

> "Absent any ambiguity, the argument derived by analogy from the law of options and by which it is sought to construe certain acts of the defendants as an irrevocable exercise of choice, lose all significance. In an option, a binding contract arises when the optionee exercises the right under the option. . . . Strictly speaking, we are not confronted here with an option—*i. e.,* with a contract which gave the optionee 'a right against the optionor for performance of the contract to which the option relates upon the exercise of the option.' (Warner Bros. Pictures v. Brodel, *supra,* p. 773.)" [R. 46-7.]

Defendants had a privilege of choice as was the situation in *Murchie v. The Mail Pub. Co. Ltd.,* 42 New Brunswick Reports 36; there, plaintiff had the right to choose a chaperon for a trip which she had won in a prize contest, and did make a choice. Subsequently she changed her mind and advised defendant that she desired another person to act as chaperon. Defendant refused to make the substitution, plaintiff did not go on the trip, and successfully sued for damages. The Court pointed out (p. 43) that the indication by plaintiff of her choice was not "in the nature of the execution of a power" and that so long as defendant was not prejudiced by the change plaintiff could change her mind. Similarly in the instant case the only relevant theory available to plaintiff is that of estoppel, hereinafter discussed.

Crane-Rankin Development Co. v. Duke, 185 Okla. 223, 90 P. 2d 883, cited and discussed by plaintiff (Op. Br. 34), concerned a typical option to sell an interest in an oil well. The Court simply held that the option had been exercised. Upon the exercise of the option a promise

arose on the part of defendant to pay the price and a promise on the part of plaintiff arose to convey the interest. The contract there provided that:

> " '* * * said option to be exercised on or before the 30th day of June 1935, and upon the acceptance of said option and the payment of said cash consideration first party agrees to execute proper assignment of said leases and said oil payments hereinbefore described.' "

The Court rightly held that the option could be exercised by a statement to that effect on the part of the optionee. The optionee was thereafter obligated to perform in accordance with the promise which arose upon the exercise of the option.

The Court, in the *Crane-Rankin* case called attention to the well recognized distinction between the *exercise* of an option (acceptance of the offer) and *performance* of the obligation assumed by that exercise. Plaintiff charges the trial court, in the case at bar, with overlooking that distinction (Op. Br. 32, 35). That is not so. Plaintiff's charge *assumes* that defendants alleged representations (that they intended to include the display in the picture) constituted a binding "election" just as the exercise of an option constitutes a binding acceptance of the continuing offer; plaintiff thus begs the question. *In the absence of an open offer from plaintiff, defendants' acts, indicating intention to forego one alternative, are no more binding than they would have been if there were no contractual relationship whatsoever between the parties.* Defendants' representation,—or even *promise*—that they would relinquish their freedom of choice is not binding in the absence of an estoppel, since there was no consideration for it.

The complaint alleges that on April 20, 1949, defendants "notified plaintiff that they had eliminated and would not use in the motion picture 'Love Happy' any reference to plaintiff" [R. 13-14]. Plaintiff argues that "if defendants by such a mere letter could make an election," then they could make an election prior to April 20 (Op. Br. 32, 36). Again, plaintiff begs the question. Defendants contend that no binding *election* was possible either on or before April 20; whether defendants' conduct *estopped* them from choosing to omit the display from the picture remains to be seen.

In *Hankey v. Employer's Casualty Co.,* 176 S. W. 2d 357 (Pltf. Op. Br. 32-4), plaintiff pleaded an *option.*

> "According to plaintiff's pleadings, the insurance company was the optionee of the option pled. 'An option is a mere offer which binds the optionee to nothing and which he may or may not accept as his election, within the time specified. Until so accepted it is not, in legal effect, a completed contract, but when accepted * * * it becomes a completed contract, binding on both parties' 10 Tex. Jur., pp. 56, 57. Therefore, according to the allegations of plaintiff's petition, as construed in his original opinion, the insurance company by electing not to take title to the automobile but to return it to plaintiff, and communicating such election to plaintiff, fixed the right of plaintiff to the title and ownership of said automobile. In other words, the option, which continued to be a mere offer until the insurance company elected to pay damages and return the automobile in its damaged condition, becomes a contract to do so upon the acceptance of the offer contained in the option, and the communication to plaintiff of such acceptance

by the insurance company. *There is nothing in the option as pled which would prevent a verbal acceptance.*

"It is true that we have liberally construed the allegations of plaintiff's petition in order to sustain the jurisdiction of the Court which he sought to invoke." (176 S. W. 2d 357, 362; emphasis added.)

In the case at bar it is not *possible* to find an offer from Gruen to Cowan which could have been accepted at the time Cowan did the acts relied upon by plaintiff; defendants simply promised that if, at the time they released the picture the display was omitted, or if the picture were released after January 1, 1950, they would reimburse plaintiff. The language of the Texas Court is entirely irrelevant.

In the case at bar, defendants' choice was to be made at the time the picture was released to the general public; in the *Hankey* case, no time was specified within which to exercise the option. In the case at bar, if defendants did nothing, they would automatically have become obligated to pay plaintiff the cost of the display; in the *Hankey* case defendant *had* to express an election or plaintiff's rights would *never* become fixed. In other words, *in the case at bar it was contemplated that defendants make their choice by performing one of two acts: including the display in the picture or paying its cost when the picture was released; in the Hankey case it was contemplated that defendant make its choice by an expression of choice—not by an act.*

The crucial difference between the *Hankey* case and the one at bar is so aptly expressed by the California Supreme Court in *Norris v. Harris,* 15 Cal. 226, that defendants feel impelled to quote the pertinent language therefrom; it clearly shows that the doctrine of election has no application to the situation before this Court:

> "It only remains to consider the validity of the counter-claim upon which the defendants recovered judgment. The determination of this point depends upon the construction of that clause in the bill of sale which provides that if Norris, on his arrival in Texas, should choose to take all the cattle without a count, he should notify the agent of the defendants in possession of his intention to do so, and in consideration thereof, pay the further sum of $4,000; but if a count was had, and the cattle exceeded or fell short of the estimated number of 7,000, the excess or deficiency should be paid for at the rate of eight dollars per head. No count was ever made, no notification was ever given by Norris that he chose to take the cattle without a count; but on the trial, which was brought on in the absence of plaintiff's counsel, judgment was taken for $4,000, as though there had been such notification * * *. In this respect the judgment is clearly erroneous. * * *
>
> *"The doctrine of election, upon which the defendants attempt to sustain the counter claim, has no application to the contract in this case.* That doctrine applies only to cases where the party, upon whom rests the performance, stands in the same position to both alternatives presented, *and is bound to indicate his choice between them.* Here there was no obligation resting upon Norris to choose between two things; *he was not bound to indicate any choice,*

only in the event of desiring to take the cattle without a count. If he did not desire to do so, he was not required to give notice to that effect. The obligation to pay for the excess over the estimated number, if there were any, was absolute, without any expression of choice; but the obligation to pay the $4,000 was a conditional one, dependent solely upon the indication of his desire to dispense with the count.

"In cases where the doctrine is applicable, the right of election, upon failure of the party upon whom the performance rests to indicate his choice, passes to the other side, as in this way only can the obligation become absolute and determinate. *Thus, if a debtor, by a given day, is to pay money or furnish goods, it is evident that upon a failure to indicate which of the two he will do, the obligation would be indefinite and uncertain* [like the *Hankey* case]. But this is quite different from a contract to do a certain thing absolutely by a given day, with the privilege of discharging the obligation in some other way previously. *In such case, if the privilege be not exercised, the obligation is not left in uncertainty, but is definite and absolute* [like the case at bar]. So, in the present case, the failure or refusal of Norris to indicate any desire to take the cattle without a count, did not leave the character of his obligation in any respect indefinite and uncertain." (Pp. 257-8; emphasis added.)

So in the case at bar, defendants were "not bound to indicate any choice"; they were bound, necessarily, to make their choice at the time of the picture's release. If, at that time, they failed to include the display they were bound, automatically, to pay for it. The language of "election" is irrelevant.

Finally, the June 22nd contract states that plaintiff will bear the cost of the display if it is included in the final version of the picture, provided such picture is actually released to the general public not later than January 1, 1950. Supposing the picture was not so released until after January 1, 1950, does the alleged exercise of the "option" commit defendants to release the picture before that date? If defendants released the picture after that date, are they obligated to include plaintiff's display and also to reimburse plaintiff for the cost?

2. Defendants Did Not Exercise the Option, if One Existed (Defendants' Conduct Did Not Constitute an "Election").

(a) *Defendants' Conduct Cannot Be Interpreted to Mean That Defendants Were Relinquishing Their Freedom of Choice.*

As above stated, an option is an *offer*. It must be accepted like any offer and is subject to the rules of offer and acceptance.

> *"An acceptance must be positive and unambiguous."*
>
> *Williston on Contracts, Sec. 72.*

As an illustration of insufficient acceptances, Williston gives the following, from decided cases, among which are the following:

> "I have decided on taking No. 22 Belgrade Road, and have spoken to my agent Mr. C., who will arrange matters with you."
>
> "You are low bidder. Come on morning train."
>
> "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week."

> "Have attempted twice the tender of the first payment of $500.00 upon the agreement between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon."

So whether we talk in terms of "acceptance" or "exercise of option" or "election of obligation," it is necessary, if plaintiff is to prevail, that it show a "positive and unambiguous" representation on the part of defendants that they would definitely include the display in picture when it was released to the general public.

What was the significance of "alleged declarations and acts" which plaintiff sets forth as "indicating defendants' election"? (Op. Br. 35.)

(1) "The actual use of the sign in the production of the motion picture * * *" It is self-evident that the parties *contemplated* that defendants photograph the display prior to releasing the picture. Since defendants had an absolute choice of including or omitting the display *when released,* obviously they had to photograph it before making their decision.

(2) "* * * prompt return to plaintiff of the sign and display *without their tendering its cost."* Defendants were not obligated to make their choice until final release of the motion picture; plaintiff here argues, in effect, that since defendants didn't elect to *omit* the display *prior* to the release of the picture, it elected to include the display!

(3) "* * * the expression by producer-defendants of their desire to publicize their motion picture in 'Life Magazine' and the release of photographs of plaintiff's sign and display." This is in the same category as (1),

supra. Of course, a motion picture is publicized prior to its release to the public; that, too, was contemplated by the parties. How, then, can such publicity be evidence of an exercise of an option, or an election? When defendants "encouraged" Life to publicize the picture they contemplated using and intended to use the display in the motion picture, but by no stretch of the imagination can that be contorted into a promise on the part of defendants, who had the privilege of not using the sign if it so chose, to give up its option and definitely use the sign in the final version of the picture.

(4) The two letters from defendants' director of publicity to plaintiff's public relations director [R. 22-24], sent between the date of the written contract and the date of the release of the picture, also show that defendants, at least up to October 4, 1948, contemplated using the display if the cooperative newspaper campaign, referred to in the second letter [R. 24] was worked out between the parties. Can these be construed as a definite promise on the part of defendants so as to irrevocably commit them to use the display in the final version of the motion picture? It is submitted that no reasonable business would so interpret these letters after the parties have entered into a written contract which *expressly* gives defendants the important choice exercisable when the picture is finally released.

The District Court wrote in its Comment [R. 48]: "the letters written subsequent to the execution of the contract did not alter the situation."

(5) "* * * the actual publication in Life * * *." The remarks made under (3), *supra*, are applicable here. Plaintiff emphasizes that the article appeared in Life on

February 7, 1949, just five days prior to the date which defendants' letter of October 4, 1948, stated was the time set for the premiere. Plaintiff thus attempts to make it appear that defendants permitted the Life article to appear at a time when the premiere was five days off. That is not true, as appears in the complaint itself. The premiere actually was held some time after June 24, 1949, the date of filing of the original complaint [Complaint, Para. XVII, R. 15], not less than four and one-half months after the publication of the Life article. (Defendants' letter of October 4, 1948, merely shows that *as of that date* defendants intended to release the picture on February 12, 1949.)

It is submitted that defendants' acts did not constitute "positive and unambiguous" representations that they would voluntarily, and without compensation, give up their privilege of omitting the display from their motion picture. This is even more convincingly clear when defendants' acts are compared with the direct statements made by defendants in other cases wherein the courts held that they were insufficient: see illustrations from decided cases, noted by Williston, *supra.*

(b) *An Offer Must Be Accepted at the Time Specified in the Offer.*

If an offer can be said to have existed, by virtue of Paragraphs 3 and 4 of the June 22nd contract, that offer was to be accepted at the time of release to the general public.

(c) *An Offer Must Be Accepted in the Manner Required by the Offer.*

The manner of acceptance required by the June 22nd agreement—again assuming that an unaccepted offer can be found to exist at all—was by inclusion "in the final version of your picture as released to the general public."

(In this connection, defendants wish to refer to plaintiff's contention that defendants have confused the exercise of an option and the performance to be rendered after the exercise. In the case at bar, if there was an option, the acceptance thereof and the performance required of defendants was the very same act, namely, including the display in the final version of the motion picture as released to the general public.)

B. Defendants Are Not Estopped so as to Be Deprived of Their Choice to Omit the Display and Pay for It.

Plaintiff's contention in connection with its "estoppel" theory assumes, as indeed it has to, that defendants had an absolute choice in determining whether to use the display in the picture, but plaintiff argues, in effect, that defendants, by their acts, promised to forego their privilege of omitting the display (and paying for it). The complaint alleges no consideration for this promise, but, apparently, plaintiff urges that, under the circumstances, no consideration was required since plaintiff acted in reliance on the representations to be inferred from defendants' acts.

Thus, plaintiff relies on "promissory estoppel," which is stated in Section 90 of the *Restatement of Contracts* as follows:

> "A *promise* which the promisor should *reasonably expect* to induce action or forbearance of a *definite*

and *substantial* character on the part of the promisee and which does induce such action or forbearance is binding *if injustice can be avoided only by enforcement of the promise.*" (Emphasis added.)

Thus, before plaintiff can successfully plead a cause of action on the basis of this doctrine, it must allege the following elements:

(1) A *promise* on the part of defendants.

(2) That *defendants should reasonably have expected* that their promise would induce action on the part of plaintiff.

(3) That that action would be *definite.*

(4) That that action would be *substantial.*

(5) That the promise does in fact induce such action.

(6) That injustice can be avoided only by the enforcement of the promise (despite the fact that there is no consideration for the promise).

1. Defendants Made No Representation Which Can Be Construed as a Definite Promise to Use the Display.

Plaintiff enumerates the acts upon which it relies as constituting a promise to use the display (Op. Br. 37-8); these are, substantially, the acts upon which plaintiff relies as constituting a binding "election" (or exercise of option) under its "election" theory. Defendants immediate criticism of plaintiff's "estoppel" theory is similar to that of plaintiff's "election" theory, and, for the purpose of avoiding repetition, the Court is respectfully referred to Point III, A, 2, a, *supra.*

Defendants do wish to call the Court's attention specifically to plaintiff's statements (Op. Br. 38) that defend-

ants "permitted" and "induced" plaintiff to release publicity. There is no allegation whatsoever in the complaint that defendants permitted or induced the release of publicity by plaintiff, nor even that defendants ever knew of such release of publicity.

The California law requires that, to be the foundation of an estoppel, a representation of future intention be *"absolute in form."*

Seymour v. Oelrichs, 156 Cal. 782, 798.

> "The representation, further, to justify a prudent man in acting upon it, must be plain, not doubtful, or matter of questionable inference. *Certainty* is essential to all estoppels."
>
> *Bigelow, Estoppel,* 6th Ed., p. 641.

To the same effect is *Veatch v. Standard Oil Company,* 49 Fed. Supp. 45, 49, aff'd 134 F. 2d 173.

2. Defendants Should Not Reasonably Have Expected That Their Acts Would Induce Action on the Part of Plaintiff.

No normal businessman would have acted on the strength of defendants' actions, especially after the parties had entered into a written contract giving defendants the absolute choice of omitting the display.

3. Defendants Should Not Reasonably Have Anticipated Any Specific Action by Plaintiff.

There is no allegation in the complaint which might indicate that defendants should have known that their acts would induce plaintiff to release publicity to trade papers.

> "A promise of one thousand dollars with which to buy a motor car may thus be binding if it induces the

purchase of the car. A promise of one thousand dollars for no specified purpose will not be binding, though it induces similar action."

1 *Williston on Contracts* 504.

4. Defendants Should Not Reasonably Have Expected That Their Acts Would Induce Action of a Substantial Character on the Part of Plaintiff and Plaintiff's Action Was Not Substantial.

The mere fact that plaintiff called the special attention of its dealers to the Life article (which they probably would have seen anyway) surely does not amount to "substantial" action.

In *Veatch v. Standard Oil Company,* 49 Fed. Supp. 45, aff'd 134 F. 2d 173, the Court wrote:

> *"In the cases of 'promissory estoppel,' which have been enforced by the court, it appears that the alleged promise has been an express promise in specific terms and the action or forbearance of the promisee has resulted in some substantial detriment to the promisee, and that such detriment was either intended by the promisor or else 'he should reasonably have expected such detriment would be incurred.'*—Williston on Contracts (Revised Edition), Vol. 1, p. 502, s. 139." (P. 49; emphasis added.)

Williston, in his work on Contracts, writes:

> "It should be noticed that no slight acts or merely technical reliance will serve." (P. 499.)
>
> "The binding thread in all of the classes of cases which have been enumerated is a *justifiable reliance of the promisee and the hardship involved in refusal to enforce the promise.*" (P. 501; emphasis added.)

See:

Bard v. Kent, 19 Cal. 2d 449.

5. Defendants Did Not Act for the Purpose of Inducing Action by Plaintiff.

The California law requires that a representation, to be the basis of an estoppel, be "deliberately made for the purpose of influencing the conduct of the other party."

Seymour v. Oelrichs, 156 Cal. 782, 798.

The complaints contain no allegation to satisfy this requirement.

Plaintiff points out (Op. Br. 37), in its quotation of part of a sentence taken from California Jurisprudence in this section of its brief, that the party against whom the doctrine of estoppel is invoked must have *elected* one of two inconsistent courses. This would, of course, bring us back to the question of whether defendants have so elected. Defendants argued above that they did not. Moreover, the authority from which plaintiff quotes, states, immediately preceding the portion set out by plaintiff, that "this doctrine resembles that of election, ratification and affirmance * * * a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct *to the injury of another.*" The illustrations given by this authority, which plaintiff neglects to set out, are of an entirely different character from the situation in the case at bar. One of the more familiar illustrations is:

> "By trying a case on the theory that certain facts are in issue, the parties are estopped on appeal to claim that they were omitted."

Plaintiff fails to state a single case where a party successfully invoked the doctrine of estoppel under circumstances similar to those in the case at bar.

IV.

Since Defendants Paid the Cost of the Display They Were Free to Make Such Use of It as They Pleased.

The District Court wrote in its comments:

> "The undertaking on the part of the representative of the plaintiff was that they would construct certain advertising displays or lay-outs—to use the newspaper phrase—and that, if Cowan incorporated them in their 'final' picture, the cost would be borne by the advertiser. If not, the cost was to be borne by Cowan. The first line in Paragraph 3 recites that expenses are to be incurred 'in preparing for your use,' the advertisements and displays. So it seems to me that the inescapable conclusion is that stated in the prior memorandum which summed up the agreement in the two sentences: 'The only penalty for not using the display is liability for price. * * * Cowan was free to do what he pleased with the property if he paid for it.'" [R. 47.]
>
> "For, if, as we hold, the agreement called for the construction of these layouts for Cowan's use, *their non-use with the plaintiff's name on it called* [*for*], as the only penalty, *liability for its cost*—a different liability cannot be thrust upon either Cowan or Bulova because Cowan, having paid for the layout, was, as stated in the prior memorandum, 'free to do what he pleased with it.'" [R. 49; emphasis added.]

It is submitted that the District Court has correctly stated the "binding finality of the simple, unequivocal obligation contained in these two paragraphs." [R. 45; referring to Paragraphs 3 and 4 of the written contract.]

The principle that

> "The consideration draws to it the equitable right of property; the person from whom the consideration actually comes, under whatever form or appearance, is the true and beneficial owner."
>
> 3 *Pomeroy's Equity Jurisprudence,* 5th Ed., p. 897.

is recognized in several situations similar or analogous to that found in the instant case:

When the original owner of chattels recovers for conversion of his property, the converter-defendant becomes the owner of the property as a matter of law.

When an architect furnishes plans and is paid for them, the *builder* owns the plans (even though the contract is silent on the point).

> *Berlinghof v. Lincoln County,* 128 Neb. 28, 257 N. W. 373;
>
> *Hill v. Sheffield,* 117 N. Y. Supp. 99;
>
> *Windrim v. City of Philadelphia,* 9 Phila. 550;

and the architect cannot prevent *any* use of those plans. Thus, it has been held that an architect cannot prevent even a stranger to the contract (between the architect and builder) from using the plans to build a house of his own; the plans belong to the builder.

> *Wright v. Eisle,* 83 N. Y. Supp. 887.

In *In re Galt,* 120 Fed. 64, the Court, faced with construing a contract as one of bailment or conditional sale, held that it was one of bailment. The Court pointed out that "* * * nowhere in the agreement does the latter [defendants Cowan] covenant to pay for these goods as in the case of a sale." (P. 69.) The implication is clear that if defendant *had* covenanted to pay the cost he would have owned the property.

The contract provides that plaintiff prepare the display for defendants' use. Defendants were to pay nothing if they used the display to advertise plaintiff's product, but if they used it for any other purpose—or didn't use it at all—defendants were to pay for it. *Paragraph 4 of the contract recognizes the possibility of a use other than that to advertise plaintiff's product* by providing that "you [defendants] will bear the cost incurred in connection with the construction and erection of any or all of such signs and displays which are *not actually included in the picture substantially in the manner presently represented to you.*" [R. 21.] The contract thus contemplates that the display might be used in a manner not as represented (in which case defendants would be obligated to pay its cost).

Plaintiff devotes a large portion of this section of its argument (Op. Br. 43-45) to *Liggett & Meyer Tobacco Co. v. Meyer,* 101 Ind. App. 420, 194 N. E. 206, which holds that a *novel* idea embodied in concrete form can be the subject of a sale and that an *implied* contract to pay the reasonable value may arise when the defendant knowingly receives and uses property sent him under such circumstances as indicate that a sale is intended.

If plaintiff here, in the absence of an express contract, had submitted to defendants a novel idea under circumstances which indicated that plaintiff expected to be paid for it if used, an implied contract might arise. But there are several reasons why that is not true in the case at bar:

(1) An implied agreement by defendants to pay for the reasonable value of the idea is *negatived by the expressed contract.* The contract expressly provides the amount defendants are to pay if they did not use the display "as represented."

It would surely be strange if Cowan were "free to do what he pleased with the property" yet not free to use the so-called "idea" embodied in it.

(2) The idea in no sense can be said to be a novel one. What can be said to be novel or original about the use of an illuminated clock with a swinging pendulum? That is the alleged "idea." It can hardly be said to be an idea at all.

Ball, *The Law of Copyright and Literary Property*, Sec. 227.

The purpose of the requirement that an idea be novel before it is protectible, is not to permit one person from forever precluding another from using a common idea—one in the public domain—merely by suggesting it to him. Defendants certainly cannot be precluded from using the idea of a neon clock in one of his pictures because plaintiff suggested it to them.

National Telephone Director Co. v. Dawson etc. (1924), 214 Mo. App. 691, 263 S. W. 483, cited by plaintiff (Op. Br. 42), adds nothing to plaintiff's argument. Defendants in the case at bar passed nothing off as belonging to plaintiff, they did not misappropriate any property belonging to plaintiff and had the right to use the film as they chose, since *they paid for that right.*

Plaintiff speaks (Op. Br. 40-41) of the "alternative acts," referred to in California Civil Code, Section 1450, as though, in the instant case, they were "use" and "non-use" of the display. Once again, defendants submit, plaintiff begs the question; the question *is*, precisely, *whether* the alternative acts were (1) "use" and (2) "non-use," or whether the alternative acts were (1) use "as represented" (*i. e.*, to advertise plaintiff's product), and (2) payment of the cost of the display. Defendants have

argued above that, as the District Court held, it is the latter set of alternative acts which satisfy the language of the written contract and which are fair and equitable.

Plaintiff refers (Op. Br. 41) to its "literary property rights." Nowhere in the complaint can it be found what that "literary property" was, nor is there any allegation that it was original material. And *there is no allegation whatsoever in the complaint that defendants used any literary property belonging to plaintiff!*

It should be noted, too, that nowhere in the complaint is it alleged that the display furnished by plaintiff was distinctive, that it had been closely associated with plaintiff's name or that there was any secondary meaning. The display was simply a common neon-outlined clock with no commercial significance whatsoever.

Under Point II, B, *supra,* defendants indicated that they would, at this point, refer to plaintiff's contention that a covenant should be implied on the part of defendants not to use the display without plaintiff's name on it. As pointed out under Point II, a covenant may be implied only when it is *indispensable* to effectuate the intention of the parties as it arises from the language of the contract or to prevent one party from interfering with the other's enjoyment of the consideration he was to receive. In the instant case that consideration was the cost of the display. Moreover, since defendants had the right to do with the property (or at least the film) as they pleased, having paid for the display, of course no covenant can be implied limiting defendants' right. Plaintiff is urging this Court, *on the basis of good faith and fair dealing,* that it be permitted to keep the display, to retain all rights in connection with its use and, also, to collect from defendants the cost of the display!

V.

Motions to Strike.

The portions of the complaint which defendants moved to strike are underscored in the Appendix to Plaintiff's Opening Brief.

Defendant's motions to strike designated as A, C, D and E refer to matter which is relevant only if plaintiff can introduce parol evidence of the alleged prior oral agreements, and the District Court's order granting said motions should be affirmed unless the judgment of the law or court is reversed on this ground (Point I of Brief).

Motions B, F and Q should have been denied only if plaintiff has stated a cause of action for piracy of an idea (Point IV of Brief).

Motions G, H, I, K and L should have been denied only if plaintiff has stated a cause of action based on "estoppel" or "election" (Point III of Brief).

Motion J should have been denied only if plaintiff has stated a cause of action based on "estoppel" (Point III(2) of Brief).

Motions M, N, O and S should have been denied only if plaintiff has stated a cause of action sounding in tort, since exemplary damages are not allowable in contract actions.

State of California, Civil Code, Sec. 3294.

Motion P should have been granted as the allegation is a conclusion of law.

Motion R should have been granted because it refers to alleged elements of damage which are not recoverable under *any* theory advanced by plainitff. In the first place, they are highly speculative and uncertain. In the second place, if plaintiff recovers for breach of contract to include the display in the picture, it is entitled to the fair value of the advertising it would have received and to nothing else; if plaintiff recovers for piracy of idea it is entitled merely to the decrease in value of that idea by defendants' wrongful use thereof; if plaintiff recovers on the theory of an implied sale of the idea, it is entitled merely to the fair value of the idea.

It is submitted that the judgment below should be affirmed.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP, and
LEONARD A. KAUFMAN,

Attorneys for Appellees, Artists Alliance, Inc., Lester Cowan Productions, Lester Cowan, individually, and Lester Cowan, doing business as Lester Cowan Productions.

APPENDIX.

Digests of Cases Cited by Defendants under Point II, A, of their Brief: No obligation to include the display in the final version of the motion picture can be implied so as to deprive defendants of their choice to eliminate the display and pay for it.

The reporter's headnote preceding the opinion in *Amalgamated Gum Co. v. Casein Co. of America,* 146 Fed. 900, succinctly sets forth the facts therein:

> "Plaintiff, a manufacturer of a patented paper coating under a secret process, for the purpose of marketing the same, agreed to sell to defendant as its sole customer on condition that defendant should accept specified quantities of the product, but that if defendant should not accept such quantities, then plaintiff should be at liberty to sell to others. The agreement then required plaintiff to sell further quantities 'if asked for', and due notice given by defendant, the last clause of the agreement being that it was understood and agreed that in certain contingencies or the happening of unforeseen events impairing the ability of either party to perform the conditions of the contract as to the 'furnishing or using' of the quantity of products previously provided for, then the parties should be relieved during the period of such disability from 'furnishing or taking' such products, otherwise than the capacity and ability of the parties to 'supply or use' the amount required. The contract also provided for payment for amounts 'taken' by defendant. Held, that the contract did not contain any covenant or obligation binding defendant to accept or take the product in the amounts specified, and that no such covenant could be implied." (pp. 900-1.)

The Court quotes the following language from the agreement with which it was concerned:

> "The said party of the first part agrees to sell * * * unto the said party of the second part, upon condition that the said party of the second part shall accept from the party of the first part * * * *but in case the said party of the second part shall not accept* from the said party of the first part the quantity of said products hereinbefore set forth in any of the years above described, then and in that case it is understood and agreed that the said party of the first part shall be and is at liberty to sell its paper coating products in the United States and Canada without reference to the said party of the second part except to protect the said party of the second part with such customers of the party of the second part as shall be supplied with said products of the said party of the first part direct by the party of the second part." (Emphasis added.)

and stated:

> "I fail to discover any good and sufficient reason for the insertion of this language if there was or was supposed to be an outright and absolute agreement on the part of defendant to take the product in the amounts specified. It seems to me to be a provision that demonstrates the plaintiff did not understand defendant was binding itself to take the product." (p. 908.)

The Court held that an agreement to take the product could not be implied from the language of the entire contract. In fact, the language negatives any idea of an

agreement on the part of defendants to purchase, take or accept plaintiff's product or any of it:

> "* * * why was a clause imposing such obligation omitted? Why were words clearly importing a purchase or an obligation and an agreement to purchase, or take, or accept such quantities omitted? *The parties evidently had the particular matter or subject in mind, but in place of language plainly implying an agreement to purchase, take, and accept and pay for the amount of the product specified deliberately selected words indicating the contrary purpose.*" (p. 909.) (Emphasis added.)
>
> "* * * defendant did not agree and was not required to agree to take or accept such quantities or any quantity whatever. The absence of any agreement in words to purchase or accept or of any equivalent expression is very significant. Again, *the parties have expressly agreed on what the consequences shall be if defendant does not accept the quantities of the product specified, and, under the authorities, where this is the case no further covenant or agreement on that subject will be implied. Hawkins v. United States,* 96 U. S. 689-697, 24 L. Ed. 607-610. Also, see numerous cases cited 15 Am. & Eng. Encyc. of Law, 1078." (pp. 910-911.)

The provision that in case defendant should not accept a specified amount of the product, plaintiff could then go in and occupy the market in the named territory, "fairly implies" that defendant had the right not to accept any (pp. 913-914).

In *Arthur v. Baron De Hirsch Fund*, 121 Fed. 791, the parties executed a written contract under the terms of which defendant agreed to loan plaintiff a certain sum to be used in the erection of houses on land belonging to

plaintiff, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendants should name, provided the purchaser would assume the payment of the mortgage to defendant, pay ten per cent of the price in cash, and execute a second mortgage to the plaintiff for the balance.

On the failure of defendant to provide purchasers for the houses, plaintiff sues for breach of contract, contending that defendant impliedly agreed to so secure purchasers.

The trial judge directed a verdict for the defendant at the close of plaintiff's evidence. Affirmed.

> "The general rule applicable to the question to be determined is expressed in *Hudson Canal Co. v. Pennsylvania Coal Co.,* 8 Wall. 288, 19 L. Ed. 349, as follows:
>
> 'Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule, unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect.'
>
> "There are many cases in which contracts have been construed to impose an obligation not expressed upon one of the parties, when, in its absence, there would have been no consideration for the undertaking on the part of the other party; but those cases in which particular contracts have been held to imply such an obligation do not greatly aid the present inquiry. * * *.

"Undoubtedly, the parties to the present contract contemplated and expected that the defendant would find purchasers for the houses, and knew that the failure or *refusal* of the defendant to do so would deprive the plaintiff of some of its anticipated benefits; but that fact, and the consideration that, although the plaintiff covenanted to sell to purchasers named by the defendant, the defendant did not covenant to find purchasers, are not enough, in view of the other provisions by which substantial benefits were secured to the plaintiff to raise the implied promise.

'*When it is apparent that the parties had the subject in question in mind, and either has withheld an express promise in regard to it, one will not* be implied.' *Zorkowski v. Astor,* 156 N. Y. 393, 50 N. E. 983. *That the parties contemplated that the defendant might not find purchasers is plain, because the contract provides that, if the defendant does not name the grantee 'as soon as the house is finished,' the plaintiff is to let or lease every one of the houses at specified monthly rentals, no term of lease being fixed.* It is true *this provision contemplates that the houses are to be leased to tenants to be secured by the defendant, but nevertheless it denotes their understanding that the defendant might not secure purchasers,* and in that case that the plaintiff, while under an obligation to accept the tenants, should not be required to accept them for any definite period. *This provision is quite inconsistent with the theory that the parties understood or intended that the defendant should be bound to produce purchasers.*

"The agreement sought to be implied is, in effect, one that the defendant would purchase the houses. If this was the understanding of the parties, why was this most important covenant omitted? And if it is to be implied, how does it happen that the

contract contained no provision obligating the plaintiff to sell, but left it within the power of the plaintiff to exact terms to which no purchaser might be willing to accede? Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. *The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound.*" (Pp. 795-796; emphasis added.)

Railroad Service and Advertising Company v. Lazell, 200 App. Div. 536 at 537:

> "The acceptance of the offer to pay a definite sum for the placing of the advertising cards cannot be said to imply that the plaintiff agreed to place the advertising, for paragraph 2 of the acceptance expressly permits the plaintiff to remove at any time all or any part of the advertising matter covered by the alleged contract."

Delaware & Hudson Canal Company v. Pennsylvania Coal Company, 19 L. Ed. 349, 8 Wall. 276:

The complaint *alleged* that the defendants agreed that all coal mined by them in their coal mines and transported over their railroad to the place where the railroad connects with the canal of the plaintiff, should be transported from that place to tidewaters upon plaintiff's canal and that they would pay to plaintiff the toll prescribed. The contract, however, contained no such express undertaking by defendants and plaintiff seeks to imply one.

In their agreement the plaintiff agreed to furnish at all times thereafter, all the facilities of their canal to the boats of the defendant, at specified toll charges, with the

proviso that plaintiff should not be bound to allow any quantity of defendant's coal to be transported in excess of a certain tonnage per season unless they should enlarge their canal.

Defendant agreed to use all their influence to cause the speedy construction of a railroad from the coal lands which they owned to plaintiff's canal and agreed that if the construction of the railroad was not commenced within one year and completed within three years, plaintiff may declare the agreement null and void.

Defendant constructed the railroad and put it into operation and plaintiff immediately entered upon the work of enlarging their canal and they "continued to prosecute the work with diligence and at great expense until the same was completed."

Defendant induced another railroad company to construct a branch road and connect it with their railroad at the same place where the latter connects with plaintiff's canal and defendant thereafter diverted their coal to be transported over the branch railroad of the other company to the tidewaters (to plaintiff's damage in the sum of $900,000.00).

> "Provision is made by the agreement, it is admitted, that the rates of toll to be charged by the plaintiffs shall be permanently reduced, and the *plaintiffs contend that the defendants, in consideration of that stipulation assumed a correlative obligation to send all their coal brought over their railroad to market upon the plaintiffs' canal.* * * * plaintiffs contend that the obligation in that respect is so plainly contemplated by the agreement that the law will enforce it as an implied covenant as fully as if it were expressed in appropriate words" (p. 353).

Judgment rendered in favor of defendant, after demurrer sustained, affirmed.

"Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect; as where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is so framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfill his contract. *Churchward v. The Queen,* Law Rep. 1 Q. B. 195" (p. 353).

"Reference is made by the plaintiffs to the provision of the agreement extending certain facilities to the boats of the defendants and covenanting for a permanent reduction in the rates of toll upon the plaintiffs' canal, as calling for a different construction of the articles of agreement, but *it is quite obvious that those concessions were made as inducements to the defendants to locate and construct the contemplated railroad from their coal lands to the plaintiffs' canal, so as to form a continuous line of transportation from the coal mines, over the canal, to tidewaters. Great advantages were expected to result from*

the completion of that railroad, and it is quite evident that the plaintiffs were willing to accept the PROSPECT *of increased freight for transportation upon their canal as affording full compensation for the concession which they made in the articles of agreement"* (p. 354; emphasis added).

Foley v. Euless, 214 Cal. 506, 6 P. 2d 956:

Plaintiff, fruit packer, entered into written contract with defendants, representatives of a pool of grape growers. Plaintiff agreed to receive at his packing house such of the raisins of the pool members which defendants will have the members of the pool deliver to plaintiff's packing house not later than January 1, 1930. Plaintiff agreed to process these grapes and market them and compensation was provided for.

Plaintiff seeks recovery of $100,000.00 for breach of contract, alleged to be defendant's failure to cause the members of the pool to deliver their grapes to plaintiff's packing house. Plaintiff contends that "as the agreement prohibited him receiving at the described packing house any other raisins of the varieties named, and that as the agreement was to remain in force and effect until all the raisins delivered had been processed, sold, and delivered to buyers, there was an implied covenant on the part of the respondents to cause all of the growers' raisins to be delivered to him."

Demurrer sustained without leave to amend, affirmed.

"Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision

is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. * * *

"* * *

"With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. *The omission of such a covenant might have been intentional* on the part of respondents, as the quantity of raisins to be delivered might be determined by them and be governed entirely by the good faith of appellant in performing his obligations and his success in marketing those delivered. The executed contract was clear in its terms and left to the judgment of respondents the quantity of raisins to be delivered. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins to be delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him" (pp. 511-512).

Tanner v. Olds, 166 P. 2d 366 (affirmed 173 P. 2d 6).

The parties were adjoining land owners who entered into a community oil lease as lessors, expressly providing that in the event the lessee should quitclaim any lots from the lease the owners of such lots would nevertheless continue to participate in the royalties to the same designated extent. Further, it was expressly provided in the community lease that if and when a lot was quitclaimed back to the owner the community lessee would have the right of ingress and egress over the quitclaimed lot, would have

the right to lay pipe thereon, and have the right to retain eight acres around each community well, even though such acreage might include a portion of the quitclaimed lot.

The lessee did, in fact, quitclaim back to defendant her lot. Defendant then leased her lot to "X" and received royalties from "X," and, at the same time, continued to receive her portion of the royalties from the community lease. The operations on the land by "X" drained oil from the community pool and plaintiff, another lessor to the community lease, contends that the court should imply a provision in the community lease to the effect that:

> " 'While the owner of a quitclaimed lot may produce oil therefrom he shall be prohibited from producing the same when to do so will cause any drainage from the common pool from which the community wells were producing or forfeit his right to his share of the community lease royalty.'
>
> "Such a provision would be contrary to the express terms of the contract which named only three restrictions upon a quitclaimed lot. The law is settled that an implied condition cannot be inserted in a contract as against the express terms of the contract or to supply a condition upon which the contract is intentionally silent. (*Tanner v. Title Insurance & Trust Co.*, 20 Cal. 2d 814, 824, 129 P. 2d 383; *Foley v. Euless*, 214 Cal. 506, 511, 6 P. 2d 956.) Had the parties desired to put a further restriction upon a quitclaimed lot, such as appellants seek to have the court imply, they could have done so by inserting such a provision in the lease. (See *Clark v. Elsinore Oil Co.*, 138 Cal. App. 6, 31 P. 2d 476.)
>
> "It is not our duty to alter a contract by construction or to make a new contract for the parties. We

> are confined to the interpretation of the agreement, which the parties have made for themselves, without regard to its wisdom or folly as shown by events subsequent to the execution of the contract. * * * it cannot reasonably be said that the contract was incomplete or that some implied covenant should be read into contract to equalize the advantages of the parties" (pp. 368-9).

Maryland v. B. & O. Railroad Company, 22 L. Ed. 713, 22 Wall. 105:

The Court in refusing to imply an undertaking on the part of defendants, wrote:

> "Conceding that such an undertaking may be implied, when there is no express promise to pay in gold, still the implication must be found in the language of the contract. It is not to be gathered from the presumed or the real expectations of the parties" (p. 714).

It is "inadmissible to deduce an implication of a promise, not from the contract itself, but from the extraneous fact that such a promise ought to have been exacted. Ordinarily a reference to what are called surrounding circumstances is allowed for the purpose of ascertaining the subject matter of a contract, or for an explanation of the terms used, *not for the purpose of adding a new and distinct undertaking"* (p. 715; emphasis added).

In *Loyalton Electric Light Company v. California Pine Box & Lumber Company,* 22 Cal. App. 75, the parties in their written agreement had expressly obligated them-

selves to do certain things and the Court refused to enlarge their obligations by implication. Demurrer to the complaint was sustained and judgment rendered thereafter was affirmed by the Appellate Court. In the case at bar, defendant, Artists Alliance, agreed only to bear the cost of the sign if it did not advertise plaintiff's name in the picture; having thus undertaken a definite obligation with respect to the subject matter, another obligation cannot be implied to use the sign under any circumstances.

In *Walter R. Cliffe Co. v. Du Pont Engineering Co.,* 298 Fed. 649, and *Ericksen v. Edmonds School District No. 15,* 125 P. 2d 275, plaintiffs relied on the well accepted general rule of law that there rises an implied obligation on the part of a party to a contract not to hinder or delay the performance of the other party's obligations. While recognizing this general rule of law, judgment went for defendants in both cases because of language in the contracts involved which negatived such an implied obligation on their parts. In the *Cliffe* case, this result was reached by sustaining defendants' demurrer to the complaint.

No. 12528

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, individually; LESTER COWAN, doing business as LESTER COWAN PRODUCTIONS, and BULOVA WATCH COMPANY, INC.,

Appellees.

BRIEF OF APPELLEE BULOVA WATCH COMPANY, INC.

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TABLE OF AUTHORITIES CITED.

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BRIEF OF APPELLEE BULOVA WATCH COMPANY, INC.

Introductory Statement.

To spare this Honorable Court any unnecessary repetition, appellee Bulova hereby joins in the brief submitted by the producer appellees in this cause, without restating the grounds and arguments therein set out in support of appellees' position that the District Court's judgment of dismissal should be affirmed. This brief will be devoted primarily to appellant's Point V, which is directed at appellee Bulova.

Statement of Appellee Bulova's Contentions.

In addition to the contentions raised by producer appellees, appellee Bulova urges that no cause of action can be stated for inducing the breach of contract where the complaint shows that the contract was not in fact breached but was fully performed as contemplated; that there can be no cause of action stated for a conspiracy to induce action where the action allegedly induced was lawful; and that no cause of action for unfair competition or interference with advantageous economic relations can be stated under the law of California under any theory whatsoever under the allegations of appellant's complaint.

I.

Appellee Bulova Cannot Be Charged With the Inducement of a Breach of Contract Where the Complaint Shows That Appellant Received Full Performance as Contemplated by the Contract and There Is Therefore No Breach.

Appellee Bulova will not in this brief argue further the existence, unambiguity, and full performance of the contract as fully developed in producer appellees' brief.

A leading California case affirming a judgment entered after sustained demurrer is *Sweeley v. Gordon* (1941), 47 Cal. App. 2d 385 at 387, where the court upon rehearing said that the ". . . cause of action was based upon allegations that Neubeiser wrongfully induced Gordon to violate his contract with plaintiff and to assert the invalidity of the contract because of the failure to comply with the statute of frauds. Gordon had the legal right to stand

upon the statute of frauds and Neubeiser did not become liable in damages to plaintiff if he did in fact induce Gordon to stand upon his legal rights."

Sweeley v. Gordon (1941), 47 Cal. App. 2d 385.

Clearly, appellant can state no cause of action against appellee Bulova by alleging that Bulova induced appellee Cowan to do what he was legally entitled to do.

II.

Appellee Bulova Cannot Be Charged With Conspiracy When the Act Alleged to Be the Subject or Object of the Conspiracy Is Lawful.

A leading California case in support of this contention, also affirming a judgment of dismissal following a sustained demurrer, is *Harris v. Hirschfeld,* 13 Cal. App. 2d 204, where the court said at page 206: ". . . conspiracy is not actionable unless the combination results in the perpetration of (1) an unlawful act, or (2) some injurious act by lawful means." In that case the court held that no cause of action, for conspiracy or otherwise, lay where the defendant's act was to induce the termination of a partnership at will.

Harris v. Hirschfeld, 13 Cal. App. 2d 204.

In the case at bar, appellant does not allege any unlawful means, and the act alleged is clearly lawful as it was contemplated specifically by the parties and clearly expressed in the contract.

III.

Appellant Under the Allegations Pleaded Does Not State a Cause of Action for Unfair Competition on Any Theory Whatsoever.

The tenuousness of appellant's position is apparent in the following quotation from page 50 of appellant's brief:

> "We, of course recognize that in many instances interferences with normal business relations have been justified on the theory that normal business competition is bound to result in some such interferences and hence that any damages arising therefrom is not actionable. However, we do not believe that the law permits any and all interferences under the guise of competition, and we think that the circumstances of the present case are such as to 'bring it outside the ordinary course of competition,' within the language of the California Supreme Court decision just above cited, Buxbom v. Smith."

Contrary to appellant's statement and authorities, the alleged facts in this case differ materially from the cited cases and fall far short of the criteria set up by the law basic to the imposition of liability in the competitive field. As stated by appellant (B. 23), Gruen and Bulova are principal and intense competitors, as befits two of the largest watch manufacturers in the world.

The law of unfair competition, especially as to the activities of third persons, is a relatively modern development. As is true in any new non-statutory field of law, the early cases involve the most flagrant abuses, and the

refinements of theory follow subsequently. That is why the Restatement of Torts admits the difficulty of laying down precise rules but summarizes the law as follows in subsection (1) of Section 768:

> "Privilege of competition.
>
> "One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if
>
> "(a) the relation concerns a matter involved in the competition between the actor and the competitor and
>
> "(b) the actor does not employ improper means, and
>
> "(c) the actor does not intend thereby to create or continue an illegal restraint of competition, and
>
> "(d) the actor's purpose is at least in part to advance his interest in his competition with the other."
>
> *Restatement of Torts*, Sec. 768(1).

The facts alleged by appellant clearly bring the case at bar within the cited Restatement section. California follows the Restatement rule, and the applicable law is very clearly set forth in the leading case of *Katz v. Kapper* (1935), 7 Cal. App. 2d 1, where the court again affirmed a judgment entered after sustaining a demurrer to the complaint. The case involved defendants' attempt to induce plaintiff's customers to deal with defendants instead. At page 4 the court said:

> "The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or de-

ceit which are unlawful. Any extension of this jurisdiction must come through legislative action. In this case no questions of statutory law are involved."

Katz v. Kapper (1935), 7 Cal. App. 2d 1, 4.

The court further said on page 6:

"The alleged acts of defendants do not fall within the category of business methods recognized as unlawful, and hence they are not actionable. The demurrer to the complaint was properly sustained."

Katz v. Kapper (1935), 7 Cal. App. 2d 1, 6.

Clearly the acts alleged in the case at bar do not come close to those alleged in the *Katz* case, where no liability was found.

Firstly, in the *Katz* case, and in the others cited by appellant where liability was found, the interference alleged was directly with the fruits of the contractual relationship or the physical product of the plaintiff. In the case at bar no Gruen products or customers are involved, rather only an asserted right on the part of Gruen to seek to gain prospective customers by advertising.

Secondly, appellant does not allege any unfair methods by Bulova, but merely an "interference" variously categorized as to motive but not method.

Further, appellant should hardly be in a position to complain as the complaint shows [R. 12] that appellant in the exercise of its business judgment chose not to join in a joint advertising campaign, after being offered a prior opportunity to do so.

It therefore appears that appellant has failed to plead allegations which will bring it within any legally recog-

nized theory affording relief. While there are, as has been shown, limits beyond which a competitor legally may not go, the facts alleged here fall so far short of the prerequisites legally required that appellees respectfully urge that this Honorable Court affirm the correctness of the District Court's ruling that the parties determined the limits of their liability in clear unequivocal language.

The complaint at most shows a usual competitive situation only indirectly related to product or present consumers. The acts charged to Bulova, if true, constitute merely normal business activity that has long been legally recognized as permissible.

The cases cited by appellant may be easily distinguished from the factual situations alleged by appellant in its complaint.

(1) *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34 (cited B. 46).

This case involved a contract terminable at will, whereas the case at bar involves one of two alternative performances each unqualifiedly specified in the written contract. Further, the court apparently based its decision on the restraint of trade involved in defendants' actions, for at page 41 the court said:

> "The answer to the question whether defendants are liable for interference with plaintiff's contractual relations therefore depends on whether plaintiff has stated a good cause of action against defendants for injury to his business by activities in restraint of trade."

(2) *Romano v. Wilbur Ellis & Co.* (1947), 82 Cal. App. 2d 670 (cited B. 48).

This case also involves a contract terminable at will, with the further allegation, not present in the case at bar, of alleged false misrepresentations inducing the termination.

(3) *Buxbom v. Smith* (1944), 23 Cal. 535 (cited B. 48).

The cited case involves deliberate action on the part of defendants which directly induced plaintiff to alter his business practices and build up a distributing organization which was then pirated. In the case at bar there was no direct contact between Gruen and Bulova, and Gruen certainly did not take any action as a result of conduct or representations of Bulova.

(4) *Newark Hardware & Plumbing Supply Co. v. Stove Mfgrs. Corp.* (1948), 136 N. J. L. 401, 56 A. 2d 605 (cited B. 50).

The cited case involves a physical misappropriation of plaintiff's goods which would otherwise have been sold by him. The result in the case is easily supportable on a simple conversion theory and is not really an unfair competition case.

(5) *Owen v. Williams* (1948), 332 Mass. 356, 77 N. E. 2d 318 (cited B. 51).

In this case the court held that the defendant was not privileged as the jury could find he was acting unreasonably and in bad faith, with no gain to himself. The court recognized that a privilege could easily exist under the circumstances. The facts involved in the present case are

not analogous, as the case at bar involves a normal, albeit intense, commercial rivalry tending to stimulate efficient production to the ultimate benefit of the consuming public.

Conclusion.

Therefore, because appellant cannot establish a breach of contract by producer appellees, no liability can be asserted against appellee Bulova for alleged interference therewith. It is submitted that the complaint shows that Gruen finds itself in what it deems to be an unfavorable competitive position solely as a result of its own actions and that therefore the judgment of the court below should be affirmed.

Respectfully submitted,

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Leonard Low,
Attorneys for Appellee Bulova Watch Company, Inc.

No. 12528.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE GRUEN WATCH COMPANY,

Appellant,

vs.

ARTISTS ALLIANCE, INC.; LESTER COWAN PRODUCTIONS, LESTER COWAN, Individually; LESTER COWAN, Doing Business as Lester Cowan Productions, and BULOVA WATCH COMPANY, INC.,

Appellees.

APPELLANT'S REPLY BRIEF.

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Appellees.

APPELLANT'S REPLY BRIEF.

Although plaintiff does not agree with every statement of the law made by defendants, it is apparent that the basic differences between plaintiff and defendants do not involve legal principles but rather the applicability of those principles to the facts alleged in the complaint. This being so, we will not re-argue the several independent grounds for reversal presented in our Opening Brief.

This Reply Brief will therefore be confined to comment on certain errors in defendants' recitations of what they conceive the law to be, as well as their unwarranted assumptions and omissions to answer certain of our contentions.

ARGUMENT.

For the convenience of the Court and counsel we shall continue to use the same main subdivisions as were set up in our Opening Brief, numbers I, II, III, IV and VI, of which were commented on in the Brief of defendants Cowan, and number V of which was commented on in the Brief of defendant Bulova. Reference to our Opening Brief will be designated "O. B."; reference to defendants Cowan's Brief will be designated "C. B."; and reference to defendant Bulova's Brief will be designated "B. B." Emphasis throughout will be ours unless otherwise indicated.

I.

Inapplicability of Parole Evidence Rule.

Without attempting to recapitulate what has already been stated in our Opening Brief, we submit that defendants' position that the letter memorandum was intended to express the entire agreement and to stand alone without relation to extrinsic evidence or agreements is untenable. For example, the display to be furnished by The Gruen Watch Co., is not even described although the memorandum indicates that the nature of the display had been settled upon. Likewise, contrary to the position attributed to it by defendants (C. B. p. 8), plaintiff does not argue that the entire contract with the exception of one sentence was set forth in the memorandum. Quite to the contrary, plaintiff's position is that the memorandum is merely a memorandum, and that it was not intended to be a complete expression of every detail of the understanding of the parties. In our Opening Brief

(pp. 12-14, 16-18) we have already pointed out many of the respects in which the letter memorandum was in fact incomplete and ambiguous, which details need not here be repeated.

The three decisions cited by defendants (C. B. p. 4) involved contracts which were clearly integrated and which not only purported to but did express all material items and terms. It should be noted, however, that the latest of those three decisions was determined in 1926 and that later cases have indicated that the rule applied therein was incorrect. See: *Universal Sales Corp. v. California Press Mfg. Co.* (1942), 20 Cal. 2d 751, 776, 128 P. 2d 665 (O. B. p. 20); *Wells v. Wells* (1946), 74 Cal. App. 2d 449, 456; see also California Code of Civil Procedure, Secs. 1860, 1856.

In other words, we believe the correct rule to be that the true meaning and intent of language may always be shown by reference to extrinsic evidence despite the fact that such language on its face may appear to be clear and complete.

In support of its contention that the instant document is integrated so as to exclude extrinsic evidence, defendants (C. B. p. 6) cite the Restatement of Contracts, Section 228, Illustration 2, which contains language of confirmation similar to the language of confirmation in the letter memorandum. However, that illustration assumes that the balance of B's letter is of such a nature as to constitute an integrated document. For example, if B merely wrote "confirming our oral arrangement this morning" and wrote nothing further there would obviously be no integrated contract. Indeed, the sales contract in the

California case of *Schmidt v. Cain,* 95 Cal. App. 378, 272 Pac. 803 (O. B. p. 16), began with very similar language but nevertheless parol evidence of an oral warranty was admitted, the court holding that the contents of the contract were such as not to prevent extrinsic evidence.

Moreover, contrary to defendants' assertions (C. B. p. 15) even if the memorandum was to be considered either a partially or entirely integrated agreement, nevertheless, an earlier or contemporaneous oral agreement may be admissible where it is not inconsistent with the integration.

This rule of admissibility with respect to prior or contemporaneous oral agreements is set forth in the Restatement of Contracts, as follows:

> "Section 240. *In What Cases Integration Does Not Affect Prior or Contemporaneous Agreements.*
>
> (1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
>
> * * * * * * * *
>
> (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

See: Illustrations 4, 5 and 6.

The latter illustration provides:

> "6. A and B orally agree that A shall work for B in specified employment and that B shall pay him therefor $3000. B delivers to A a written promise in terms absolute to pay $3000 in six months. The

> oral agreement of A to do the specified work is operative both as a promise and as qualifying B's duty to pay $3000."

Defendants cite several cases (C. B. p. 8) for the proposition that a presumption exists that parties entering into a written agreement have expressed all the conditions by which they intended to be bound. But presumptions are a matter of evidence and only in a few cases (Code Civ. Proc., Sec. 1962) are conclusive; in the face of the allegations of the instant complaint any such presumption is of no more importance than would be the presumption that a written instrument is supported by consideration in the face of a pleading which alleged a lack of any consideration.

Defendants next assert (C. B. p. 9) that the agreements extrinsic to the letter memorandum are inconsistent with that document and they criticize the recent case of *Simmons v. California Institute of Technology*, 34 Cal. 2d 264, 274, 172 P. 2d 665, on the ground that it involved fraud. Nevertheless as was pointed out in our Opening Brief (O. B. pp. 14-15), that case expressly held that promises directed to the *form* of payment are not inconsistent or at variance with additional promises relating to the question of the *use* of such payments. So, in the case at bar, while a portion of the written memorandum provided which party would bear the cost of the display in the event it was or was not included, the memorandum is *absolutely silent as to what was to determine whether plaintiff's* display would or would not be included in the motion picture. Hence, the contemporaneous oral agreement as to the latter point was not at all inconsistent with

the subject matter of the written memorandum but was supplementary thereto and should have been considered by the Court below.

Defendants' argument of inconsistency is for the most part premised upon a completely false assumption, to wit: that the memorandum *expressly granted to defendants* the right to determine whether the display was to be included in the picture or not. In fact this erroneous assumption is the corner-stone of defendants' entire case and a reading of defendants' brief will disclose that defendants assert over and over again the proposition that the parties contemplated "that *defendants might choose* not to use the display" (C. B. p. 1); "that *defendants might decide* to use the display" or "that *they might decide* not to use it" (C. B. p. 14); that *defendants* had an "absolute right of selection" (C. B. p. 20); that the agreement "expressly contemplates that *defendants may decide* not to use the sign in the picture" (C. B. p. 25); that defendants were to pay the cost of the display "if *they* do not include it" (C. B. p. 28); that *defendants* had "the privilege of determining" to omit the display (C. B. p. 34); that the written contract "*expressly* gives *defendants* the important choice" (C. B. p. 43); that *defendants* had the "privilege of omitting the display" (C. B. p. 44); and that the parties "had entered into a written contract giving *defendants* the absolute choice of omitting the display" (C. B. p. 47).

But the reiteration of such language in defendants' brief only serves to emphasize their weakness, *for no such language nor anything remotely like it can be found in the letter memorandum.*

Defendants likewise cite numerous authorities in support of the general proposition that the party required to perform one of two alternative acts has the right of selection. In this connection, defendants quote from *Blake v. Paramount Pictures,* 22 Fed. Supp. 249, and from *Arthur v. Baron De Hirsch Fund,* 121 Fed. 791 (C. B. pp. 10-14). The first of those cases involved a contract which *expressly* permitted the *defendant* to select one of two performances with respect to the furnishing of motion pictures, while the second involved a contract which *specifically* authorized the lender to name a grantee upon completion of each building and provided that the builder would lease the buildings if the lender did not name a grantee.

What defendants really seek to do is to imply from the cost provisions an absolute right of capricious election to use or not to use and then to assert that the extrinsic agreement with respect to use (except in the event of inability) is inconsistent with the *implied absolute choice.* But such implication is neither required nor proper where the parties have expressly agreed, even though extrinsically, as to the matter on which the written instrument is silent.

In the case at bar, the provisions with respect to the question of the display being "included" or "not actually included" were, under the circumstances of the case, really for the benefit of plaintiff. They were never intended by the parties to give the defendant any right of choice or election in the matter. If they had so intended, it would have been a simple matter to so provide, yet no such provision appears.

Another authority relied upon by defendants as establishing their claimed absolute right of election with which any other agreement is inconsistent, is Restatement of Contracts, Section 325, Comment c. (C. B. p. 10). However, in Comment b. of the same Section 325, the Restatement sets forth an example analogous to the instant case and indicates that where alternatives are of greatly varying value to the promisee the parties must have contemplated the alternative to the *contemplated performance* to apply only in the event of *inability* to perform the contemplated obligation. So, in the case at bar, it is self-evident that both parties contemplated and were interested in the *use* of the sign rather than its non-use. Certainly plaintiff was interested only in the advertising value to be obtained from such use and was not interested in merely receiving a portion of its expenses (the actual cost of constructing the sign) in connection with the project. On the other hand, it is equally self-evident that plaintiff would be willing to accept such partial return in the event of defendants' *inability* to use the sign.

Defendants' argument that the word "agreements" cannot refer to a promise by defendants to use the display (C. B. pp. 16-18) is likewise not well taken. Apparently defendants find some difficulty with the allegations of the complaint to the effect that the agreement between plaintiff and defendants was entered into through the instrumentality of the agent Kline. The simple fact of the matter is that the producer defendants requested Kline to ob-

tain an agreement for them from plaintiff; that such agreement was obtained; and that the letter memorandum was written by Kline to producer defendants stating that such an agreement had been obtained.

Lastly, the defendants assert that there are no ambiguities in the letter memorandum. On this point we respectfully refer this Honorable Court to pages 16 through 21 of our Opening Brief, wherein we pointed out the many respects in which the letter memorandum was in fact ambiguous. However, it is interesting to note that although in an earlier portion of their brief, defendants argued that the memorandum was "a formal, composed and complete contract, with preambles, numbered paragraphing, and careful expression of the terms and conditions" (C. B. p. 8), nevertheless, in defending their position that the agreement contains no ambiguities, defendants are forced to the position that the entire paragraph 1 of the memorandum is merely "a recital or preamble to the agreement" (C. B. p. 18) and that paragraph 2 of the memorandum is also "merely a preamble." (C. B. p. 19.) We submit that the adoption of defendants' arguments would require this Honorable Court to disregard everything in the letter memorandum with the exception of a few words in paragraphs 3 and 4 of the memorandum. a method of construction which is diametrically opposed to the fundamental rule that effect must be given to all parts of an agreement.

II.

Producer Defendants Had Certain Implied Obligations.

In our Opening Brief (O. B. pp. 22-30) we pointed out that even if the parole agreement were not admissible, the memorandum contained an implied obligation that defendants would *use plaintiff's name if plaintiff's display were used.* The only answer which defendants make to this particular contention is that the provision that producers would bear the cost if the scene was "not actually included substantially in the manner presently represented," contemplated use without plaintiff's name. It is respectfully submitted that this language was inserted for the protection of plaintiff advertiser and (1) does not purport to permit substitution of a competitor's name on a display which is actually used *in the manner represented* and that (2) *since inserted for the protection of plaintiff this "alternative" cannot be taken advantage of by defendants in such a manner as to use the display, and then dub in another's name and offer to plaintiff the reimbursement contemplated only in the event of non-use of the display.*

Plaintiff likewise wishes to express disagreement with the "legal principle" asserted by defendants on pages 25 and 26 of their Brief, in support of which plaintiff cites *Delaware & Hudson Canal Company v. Pennsylvania Coal Company,* 19 L. Ed. 349, 8 Wall. 276 at 288. That case correctly states the rule with respect to implied obligations to be that the Court will not imply an obligation

*"unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect, * * *"*

Defendants' error no doubt arose from having inadvertently taken the first of four examples of *situations* in which obligations have been implied and erroneously concluded therefrom that only in that situation will an obligation be implied.

Plaintiff agrees that courts are reluctant to enlarge a written contract by implication but we respectfully wish to point out that in the instant contract (assuming as defendants claim, that the extrinsic agreement must be barred) the fact remains that this Court must necessarily either (1) (as urged by defendants) imply a free choice by the producers to use or not to use *coupled with* an implied right to use plaintiff's display and substitute the name of another thereon, or (2) imply the obligation (as urged by plaintiff) to use plaintiff's sign except in the event of inability to use it or at the very least, an obligation to use plaintiff's name *if* plaintiff's sign were used; for certainly neither obligation (1) nor obligation (2) is expressly set forth in the letter memorandum.

On page 27 of defendants' brief it is asserted that the statement of consequences to follow in the event of failure to do a certain act prevents the implication that that party agreed to do that act. This may be a correct statement of a general rule but as is pointed out previously, it does not apply where the alternative performances are

of such disproportionate value that it is fair to *imply* that the parties intended the *contemplated* performance unless through inability that performance be prevented. (Restatement of Contracts, Sec. 325, Illustration (b).) The general rule is also subject to the exception that where a clause is inserted manifestly for the benefit of one party it will not be interpreted to afford a choice to the party not intended to be benefited thereby. (See *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608; *Leezer v. Fluhart,* 105 Wash. 618, 178 Pac. 817.)

Defendants attempt to distinguish (C. B. p. 31), on the ground that they did not involve alternative contracts, the cases relied upon by plaintiff which hold that a covenant of good faith will be implied in *all* agreements (O. B. pp. 22-30). Actually, however, one of the purposes of citing these authorities was to establish the fact that the letter memorandum *was not intended to provide alternative obligations* in any such manner as to permit defendants to induce plaintiff, a corporation not in the scene-making business, to construct a display and at the last minute to demand a large sum of money as a condition to retention of plaintiff's name thereon.

Defendants also attempt to distinguish the case of *Wood v. Lucy, Lady Duff-Gordon,* 222 N. Y. 88, 118 N. E. 214, on the same ground, namely that there existed no alternative performance in that case. *However, in the instant case unless defendants gave their best efforts to use plaintiff's display, plaintiff would receive no considera-*

tion, since the asserted "alternative" was merely the reimbursement of plaintiff for funds already expended by plaintiff in constructing the sign. If plaintiff were in the display making business then the distinction made on page 31 of defendants' brief might have some validity, but such is not the case here.

Defendants state (C. B. pp. 31-32) that *Norfolk & N. B. Hosiery Co. v. Arnold,* 45 Atl. 608, may have been presented by plaintiff in a misleading manner. However, a careful reading of that case will indicate that such was not the case. That decision illustrates a situation closely analogous to the instant case and the court implied an obligation to purchase in giving a reasonable interpretation to a clause which omitted an essential but, in the judgment of the court, a necessarily implied obligation.

We submit that no matter how defendants may attempt to torture the language of the letter memorandum or close their eyes to the obvious intent of the parties to the transaction here involved, the simple fact remains that the defendants herein have thus far successfully achieved a result which clearly was never contemplated or intended by the parties at the time they entered into the transaction. It is under just such circumstances that implied obligations should be and are given effect.

III.

The Conduct of Producer Defendants Subsequent to the Execution of the Letter Memorandum Was Such as to Bind Them to Use Plaintiff's Name on Its Sign and Display in the Motion Picture.

At the outset of their argument under Point III (C. B. p. 33) defendants quote the trial court's comment to the effect that the producers had complete freedom of action up to and including the final version of the picture. This conclusion (and defendants' argument) overlooks the fact that an election can be and very commonly is exercised well prior to the date of performance.

Defendants put a hypothetical case (C. B. p. 34) in which A and B execute a contract under the terms of which B agrees to give A, on July 1st, either a horse or a cow whichever he, B, may choose; prior to July 1st B tells A that he intends to give A the horse. Defendants conclude that B would not be bound under any theory of election, but we submit that defendants' conclusion is incorrect for there appears to be nothing preventing B from choosing prior to July 1st which alternative he will perform, and by exercising his right of choice he bars himself on the date of performance from giving other than that which he has chosen. Indeed defendants' hypothetical case is almost precisely illustrative of *Hankey v. Employers Casualty Co.,* 176 S. W. 2d 357, except that defendants in their hypothetical case gratuitously achieve a contrary result.

See also Restatement of Contracts, Section 325, Illustration 3:

> "3. A contracts with B in June to sell B 100 tons of sugar to be shipped to A from Cuba to New York during the following October. A further contracts to declare the name of vessel on which the sugar is shipped. A makes four shipments of sugar in October from Cuba to New York. While all the vessels are making the voyage, A declares the name of one of the vessels as that from which he elects to deliver sugar to B. A later makes a declaration of another vessel and refuses to deliver sugar from that vessel which he first named, but tenders sugar of proper amount and quality. A has committed a breach of contract."
>
> Restatement of Contracts, Sec. 325, Illustration 3.

In attempting to distinguish the *Hankey* case, defendants also cite the early case of *Norris v. Harris*, 15 Cal. 226, in which the Court stated, in passing, that the doctrine of election had no application to the case then before the Court. In that case, it was held that in the *absence* of any choice the obligation was nevertheless definite and certain to perform a certain act. But nothing in the case indicates that a choice or election would not have been given effect.

The defendants also attempt to analogize the asserted alternative contract to an offer (C. B. pp. 44-45) but obviously the rules applicable to the evidencing of election are quite different from the rules applicable to the acceptance of an original offer.

Defendants' argument (C. B. pp. 45-49) that the facts alleged are not sufficient to raise an estoppel presents primarily a question of fact and plaintiff has little to add except to refer the Court to the acts summarized on pages 37 and 38 of our brief. For some reason defendants have seized upon the doctrine of "promissory estoppel" as being the nature of the estoppel urged. Actually an estoppel to deny an election is either (1) an estoppel *in pais,* which is defined in Black's Law Dictionary (2d Ed.) as follows:

> "An estoppel by the conduct or admissions of the party; * * *. It lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon."

or (2) an estoppel by election, which is defined as follows:

> "An estoppel predicated on a voluntary and intelligent action or choice of one of several things which is inconsistent with another, the effect of the estoppel being to prevent the party so choosing from afterwards reversing his election or disputing the state of affairs or rights of others resulting from his original choice."

Note also that California Code of Civil Procedure, Section 1962(3) specifies as a *conclusive* presumption:

> "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." (Code of Civ. Proc., Sec. 1962(3).)

We respectfully submit, therefore, that the facts set forth in plaintiff's complaint clearly gave rise to an election or to an estoppel to deny such election, or both.

IV.

The Use to Which Defendants Ultimately Put Plaintiff's Sign and Idea Was Unauthorized and Wrongful.

Our arguments on the foregoing contention were fully developed under point IV of our Opening Brief (O. B. pp. 39-45). Defendants have failed to meet these arguments.

Instead they are content to stand on the proposition that having tendered the bare cost of the display, they were free to make such use of it as they pleased (C. B. pp. 50-54). The difficulty with defendants' position is that *there is absolutely nothing in the letter memorandum which purports to give to producers any right either in the sign and display itself or to the common law property right in any idea or ideas embodied therein.* No matter what the letter memorandum might be, it is certain that it does not purport to be and is not a contract of sale; yet defendants' entire argument (under point IV) is necessarily based upon the assumption that a sale was involved.

A reading of the letter memorandum sufficiently establishes that it was not within the contemplation of the parties that the clock sequence utilizing Gruen's special display would be used *except with Gruen's name appended thereto.* The provision in the agreement referring to signs and displays "not actually included in the picture substantially in the manner presently represented to you" was manifestly inserted in order to protect plaintiff by limiting the conditions under which it would bear the cost of construction and cannot be twisted into a conversely implied authorization to defendants to take the specially designed display, and sell the same to the highest bidder

merely by reimbursing the original designer-advertiser for its cost.

Defendants attempt to distinguish the *Liggett & Meyer Tobacco Company* case on the ground that that case involved a "novel" idea, whereas, according to defendants, the instant case does not involve a novel idea. Whether an idea is or is not a novel one would seem to be a question of fact for the trial court. Plaintiff submits, however, that there is considerably *more* novelty in the idea of a huge oversized neon illuminated clock from the pendulum of which a man swings during a chase than is found in the idea protected in the *Liggett & Meyer* case.

Defendants object (C. B. p. 54) that plaintiff nowhere specifically refers to "literary property" rights. However, the complaint sufficiently alleges in Paragraph VII that plaintiff expended a substantial amount of time, thought and effort to the conception and design of the special sign and display which was the original idea of plaintiff and was and is the property of the plaintiff.

We submit that the whole tenor of the letter memorandum and the only possible intention of the parties at the time of executing the same, was that if the displays submitted were used (regardless of defendants' duty to use or not to use) the consideration which the advertisers would receive was to be the *advertising value* of the appearance of their respective names in the picture. It was not contemplated, nor should the Court permit the producers to use the sign, display and sequence worked out by plaintiff and at the same time offer to reimburse plaintiff only for the mere out-of-pocket cost as if the display had not been used and included in the picture.

V.

Answer to Contentions of Defendant-Appellee Bulova.

Bulova tacitly concedes that it is liable if the producer defendants are liable.

In answer to our contention that *even if no cause of action were stated against producer defendants the complaint states a claim against defendant Bulova.* (O. B. pp. 46-52.) Bulova relies upon the case of *Sweeley v. Gordon* (1941), 47 Cal. App. 2d 385 (B. B. p. 3), which held that a complaint failed to state a cause of action for allegedly wrongfully inducing another to assert the invalidity of a contract which did not comply with the Statute of Frauds. Bulova concludes that there can be no liability for inducing another to do what he is legally entitled to do. We submit that that decision does not express what is now the law of California with respect to the factual situation here presented. Compare *Speegle v. Board of Fire Underwriters* (1947), 29 Cal. 2d 34, 172 P. 2d 867, in which the California Supreme Court points out that intentional and unjustifiable interference with contractual relations, even if a contract is at the will of the parties, is actionable in California. (O. B. pp. 47-8.)

The other District Court cases cited by Bulova, like the *Sweeley* case, are also contrary to the recent pronouncements of the California courts relied upon by plaintiff.

Bulova finally asserts that the complaint does not state a cause of action for unfair competition on any theory whatsoever. (B. B. pp. 4-8.) In support of this asser-

tion the Restatement of Torts, Section 768, subsection 1, is cited, and it appears that Bulova attempts to avoid the allegations of the complaint by relying upon the privilege of competition. However, subdivision (a) of subsection 1 requires that "the relation concerns a matter involved in the competition between the actor and the competitor." The type of competition obviously contemplated by this section of the Restatement is *normal business competition* and it cannot be extended to afford a privilege to intentionally and unjustifiably deprive Gruen of the fruits of an advantageous relation with respect to an advertisement. In short, Gruen and Bulova are competitors in the watch business and not in the literary property, motion picture or advertising business.

Conclusion.

It is respectfully submitted that, construing the Complaint most favorable to the plaintiff and resolving all doubts in favor of its sufficiency, the Complaint in this action clearly states a claim against the defendants on one or more of the various theories heretofore set forth in our Opening Brief. Accordingly the judgment below and each and every part thereof should be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

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